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ARTICLES

PALLADIUM OF LIBERTY? CAUSES AND CONSEQUENCES OF THE FEDERALIZATION OF STATE MILITIAS IN THE TWENTIETH CENTURY

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This Article confronts the debate over various Second Amendment interpretations with regard to neomilitias. By chronicling the history of state and federal militias and using this history to ascertain the Framers' intent behind the Second Amendment, the author describes the intricacies underlying the demise of state militias—citizen armies—and the rise of a federal militia—a centralized army. The author also reveals that, despite centralization of a national defense, the Framers' original intent behind the Second Amendment (pg.192) encompassed not only to military purposes, but morally based civic republicanism purposes. In light of this historical context, the author examines present-day neomilitias and challenges claims that the Second Amendment is meaningless in a post-militia age. To this end, the author affirms the twentieth century significance of the Second Amendment and proposes an interpretation of the Second Amendment that would protect an individual's right to keep and bear arms while simultaneously preserving the Framers' original goals: centralization of a national defense and promotion of a moral function through civic republicanism.

INTRODUCTION

The origin, original intent, and subsequent development of the Second Amendment¹ has received considerable attention recently from legal scholars.² Scholars have addressed the English

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¹ "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend II.

² See Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUM. L. REV. 961 (1996); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*,

common law origins of the right to bear arms, noting for example how private citizens were expected to arm themselves for common defense of towns or villages,³ but little attention has been paid to the institutional development and decline of militias in the United States, as it relates to the modern debate (pg.193) over the meaning of the Second Amendment. It seems that answers to the following questions might shed some light on the current debate. How did an institution like the colonial militia function within the Framers' ideology? Why, during the late nineteenth century and the early twentieth century, was there a perceived need for a reform of the militia system as it existed, and with what was it replaced? Is the present day National Guard a "militia" in the sense understood by the Framers? If not, what constitutional mechanism operates today to address the concerns that the Framers felt warranted the existence of both the militia as well as the Second Amendment? Furthermore, did the militia perform as the Framers expected, and if not, why not? Finally, what role do present-day private "neomilitias," now receiving much attention in the wake of the Oklahoma City bombing, play in this American tradition?

This Article explores the possibility that the present debate puts the Bill of Rights cart before the constitutional horse. Any understanding of the neomilitia movement and the debate over the Second Amendment must be conducted in light of historical understanding of the militia, both as it existed in theory and practice at the end of the eighteenth century, as it developed during the nineteenth century, and as it exists today. A survey of American history demonstrates that the militia was a very important part of republican ideology. Along with the franchise and the jury, it served an important civic, as well as military, function. Charges of inefficiency in the early twentieth century leading to militia reform not only ignored this moral function, but failed to consider the consequences of the militia's elimination. Perceived inefficiencies from an early twentieth century point of view were seen, in the eighteenth century, as guarantees against the militia's use for undesirable purposes.

I. THE EIGHTEENTH CENTURY AMERICAN MILITIA IN THEORY AND PRACTICE

A. *Republicanism, Civic Virtue, and the Militia*

Civic republicanism, inherited by Americans from seventeenth century English "Commonwealthmen," was the primary ideological engine driving the American Revolution and the (pg.194) framing of the Constitution.⁴ Historian Gordon Wood writes that "[r]epublicanism meant more for Americans than simply the elimination of a king and the institution of an elective system. It

26 VAL. U. L. REV. 107 (1991); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647 (1994); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

³ See JOYCE LEE MALCOM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 2-3 (1994) (describing the obligation to bear arms in medieval England); Lawrence Delbert Cress, *An Armed Community: The Origin and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 26-27 (1984).

⁴ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969).

added a moral dimension, a utopian depth, to the political separation from England—a depth that involved the very character of their society."⁵

J.G.A. Pocock, commenting on the perpetuation of this English Whig philosophy in the colonies in his seminal work on the subject, points out some of the salient features common to eighteenth century civic republicanism:

The Whig canon and the neo-Harringtonians, Milton, Harrington, and Sidney, Trenchard, Gordon and Bolingbroke, together with the Greek, Roman, and Renaissance masters of the tradition as far as Montesquieu, formed the authoritative literature of this culture; and its values and concepts were those with which we have grown familiar—a civic and patriot ideal in which the personality was founded in property, perfected in citizenship but perpetually threatened by corruption; government figuring paradoxically as the principle source of corruption and operating through such means as patronage, faction, standing armies (as opposed to the ideal of the militia), established churches (opposed to the Puritan and deist modes of American religion) and the promotion of a monied interest A neoclassical politics provided both the ethos of the elites and the rhetoric of the upwardly mobile, and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation. Not all Americans were schooled in this tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.⁶ (pg.195)

Republicanism made other high moral demands on its citizens, in addition to entrusting them with the defense of their communities. For example, a citizen of a republic was expected to subordinate self-interest to the overarching good of the community.⁷ This public good was, in fact, the lodestar for a republican government.⁸ Absolutely essential to a republican government was the participation of its citizens in civic affairs; it was understood that this obligation to participate was a moral one.⁹ This moral obligation was described in the literature of the times as public or civic virtue.¹⁰

⁵ WOOD, *supra* note 4, at 47.

⁶ POCOCK, *supra* note 4, at 507.

⁷ "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution." WOOD, *supra* note 4, at 53.

⁸ *Id.*

⁹ It is this participation that makes one a "citizen" in the state, as opposed to an alien or a resident. This distinction dates from antiquity and was discussed by Aristotle in *The Politics*. "He who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state; and, speaking generally, a state is a body of citizens sufficing for the purposes of life." ARISTOTLE, *Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2024 (Johnathon Barnes ed., 1984).

¹⁰ The idea of public virtue was not original with the English, nor was the ideology of civic republicanism. Machiavelli, and other Italian theorists were writing about *virtù* hundreds of years before the concept was exported to and appropriated by the English. For a detailed analysis of the "Anglicization of the Republic," see POCOCK, *supra* note 4, at 301-422. "Public virtue entailed firmness, courage, endurance, industry, frugal living, strength, and above all, unremitting devotion to the weal of the public's corporate self, the community of virtuous men." McDONALD, *supra* note 4, at 70. "In other words, public virtue, the willingness to surrender all, even their lives, for the good of the state, was primarily the consequence of men's individual private virtue." WOOD, *supra* note 4, at 69.

As noted, one of the *bete noires* of civic republican theorists was the standing army.¹¹ A professional army was seen as another instrument that could be used by a tyrannical government to subjugate its citizens.¹² Militias served to eliminate the (pg.196) possibility of a coup by ambitious military leaders (such as, Julius Caesar). The presence of an armed citizenry also served as a visible reminder to the executive of the ability of the people to remove the magistrate by force if necessary.¹³ Finally, the militia served as an organ through which republican virtues could be transmitted to generations of new citizens.¹⁴ Because its membership was universal, there was little danger the militia itself could be employed in the service of tyranny, since its interests were considered identical to those of the community from which the militia drew its members. Furthermore, the local nature of the militia assured that its uses would be defensive. A professional army, on the other hand, tied geographically to no one place, might constantly agitate for a policy of expansion and military adventurism.¹⁵ As George Washington and other American generals found during the American Revolution, community militias were very effective at repelling invasions, but of little use for extended campaigning.

Common among political theorists such as John Locke was the idea that rulers existed because people consented to the establishment of a government for the protection of property.¹⁶ This consent was freely given and, should the government fail to provide order and protect the ability of individuals to amass and retain private property, consent could be withdrawn and (pg.197) another government established. Experience showed that rarely would an established government easily capitulate, and if the existing government kept a standing army, the government could not only resist, but could use the army to oppress the citizens. Clearly, a check had to be developed. The check that resulted from the English Civil War and the Glorious Revolution was the right guaranteed by the English Bill of Rights of all Protestants to keep arms for their defense. This right was part and parcel of the English common law inherited by the colonists settling in America.¹⁷ Of course, the colonists also relied on the militia to provide essential policing and defensive functions, and most

¹¹ See, e.g., BAILY, *supra* note 4, at 63.

¹² Republicanism was an ideology of opposites: virtue-corruption, liberty-licentiousness, natural law-positivism, etc. For each element in a virtuous state, there was a corollary corrupting opposite. See WOOD, *supra* note 4, at 52-53 (describing the obsession of republican thought with luxury and decay). The notion of a citizen militia was quickly incorporated into republican thinking in England. "[I]f a militia of freemen, independent in arms and in tenure, could be made part of [the myth of a constitution both ancient and uncorrupted], the new phenomenon of military bureaucracy would fit into place as its corrupting opposite." POCOCK, *supra* note 4, at 419.

¹³ See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1499-1500 (1987) ("[T]he military check ... might appear largely unnecessary given the seeming improbability of an attempted national coup in late twentieth century America. Yet this happy state ... is perhaps partly due to the military check itself.").

¹⁴ See POCOCK, *supra* note 4, at 432 (describing a scheme for military training for all freeholders in England as "essentially a means of education in civic virtue") (footnote omitted).

¹⁵

The paradox developed in Machiavelli's argument is that only a part-time soldier can be trusted to possess a full-time commitment to the war and its purposes. A citizen called to arms, with a home and an occupation (*arte*) of his own, will wish to end the war and go home, where a mercenary, glad rather than sorry if the war drags on indefinitely, will make no attempt to win it.

POCOCK, *supra* note 4, at 200 (footnote omitted).

¹⁶ See BAILY, *supra* note 4, at 27 ("in pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract").

¹⁷ See generally MALCOLM, *supra* note 3.

colonies required its free citizens to be enrolled in county militias and to assemble and drill regularly. One historian noted that the "very nature [of] the militia system reinforced the provincialism that was a salient characteristic of the colonial period."¹⁸ However, the militia's relative lack of social stratification, especially when compared with the rather severe class demarcations existing at that time in Europe, inspired spirited rhetoric among both Americans and European intellectuals.¹⁹ Even then, it seems, the militia system was seen as an important civic institution, serving political, and not just military, ends.²⁰

B. The Militia in the Revolutionary War

Before the Continental Army was organized by the Continental Congress,²¹ state militia units were the first to engage the British at both Lexington and Concord,²² as well as at the (pg.198) Battle of Breed's Hill.²³ When the Second Continental Congress authorized the formation of a nascent Continental Army, local militia units made up the bulk of the actual troops, although they were not accorded much respect by the professional military.²⁴ While General Washington complained of the lack of discipline in these militia units, he admitted they were useful for short periods of time during battles. The militia could be mustered with great effectiveness when its members perceived a direct, local threat. Washington's complaints stemmed primarily from his inability to keep militia units enlisted for prolonged campaigns.²⁵ Despite an uneven record overall, plenty of evidence exists showing how well these units performed in defense of their homes and towns. The battles of King's Mountain, North Carolina and Cowpens, South Carolina are two good examples of the militia's

¹⁸ See DON HIGGINBOTHAM, *THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763-1789* 7 (1971) (footnote omitted).

¹⁹ See *id.* at 12-13. "The American militiaman symbolized the 'natural' way to fight by responding to a challenge instead of honor or reward." *Id.* at 13.

²⁰ "John Adams called [the militia] one of the cornerstones of New England society—along with towns, schools, and congregations—from which the virtues and talents of the people were formed. In America the military system came close to being the nation in microcosm." *Id.* at 13 (footnote omitted) (alteration in original).

²¹ "During the early hostilities only the colonial militias, especially that of Massachusetts, occupied the field against Britain's regulars." *Id.* at 57.

²² Colonial successes at Lexington Green and Concord were due, in part, to the militias' willingness to disregard the niceties of Eighteenth Century European military doctrine and fight from places of concealment. One outraged British lieutenant called the militiamen "concealed villains" and "cowardly." *Id.* at 63.

²³ British killed and wounded at the Battle of Breed's Hill exceeded 1,000 men—some of the heaviest losses the British would sustain in the war. *Id.* at 76. In addition, Ethan Allen's Green Mountain Boys, a Vermont militia unit, scored an important coup with the capture of Fort Ticonderoga. Their surprise attack supplied much needed heavy artillery to the needy patriots. *Id.* at 67.

²⁴ "Few phenomena of American life have felt such devastating censure as the militia system." *Id.* at 7. However, Higginbotham later notes that "[r]egular American army units were too thinly ranked and the theater of war too vast to avoid a heavy reliance upon the militia." *Id.* at 11. This did not deter General Washington, the newly appointed Commander of the Continental Army from constantly pleading for a "respectable army" replete with standard uniforms and arms, and commanded by a gentleman officer corps. See *id.* at 87.

²⁵ Washington's complaints are typical of the professional military's tendency to discount the ability of militias to act as any sort of real challenge to a trained, professional, "European" army. Arguments like this, which in large part were the reason for later replacement of the militia system in favor of the National Guard tend to miss the point. Militias, as I will argue later, are intended to be provincial, decentralized, and fulfill different functions than a standing army. Despite Washington's wartime complaints, he later wrote of the militias as the "bulwark of liberty," and seemed to abandon calls for the construction of a professional, European-type army. See 26 *THE WRITINGS OF GEORGE WASHINGTON* 387-88 (John C. Fitzpatrick ed., 1938). This change of heart may owe a great deal to the antimilitarism that was prevalent in the country following the Revolutionary War.

efficacy.²⁶ To at least one contemporary (pg.199) commentator, the militia's performance at Cowpens was proof positive of the superiority of the "armed yeomanry of America" and that a "respectable and well regulated militia is the safest palladium of the liberties of a state."²⁷ Abandoning the Carolinas as a result of his defeats, the British general Cornwallis made (for all practical purposes) his final stand at Yorktown, Virginia. With his defeat went all English hopes for a continued presence in America.

The postwar period in America was marked by rapid demobilization as a wave of antimilitarism swept the nation.²⁸ The specter of standing armies was raised repeatedly by those suspicious of having a large body of idle troops at the disposal of potentially ambitious officers.²⁹ Now that the war was over and there seemed to be no immediate threats, American military policy, such that it was, coalesced around the state militia as the vanguard of national defense.³⁰ Congressional neglect of military matters under the Articles of Confederation necessitated the deployment of state militias against rebellions that sprung up periodically, and to protect the federal arsenals at West Point, New York and Springfield, Massachusetts. In both cases, the militias performed admirably.³¹

From the comments of generals like Washington and Nathaniel Greene, as well as contemporary accounts of the battles of the Revolutionary War, one can get a general sense of the effectiveness of militias. First, militia units were most effective when the battles for which they were mustered took place near their community. Second, while able to muster a substantial number of militiamen relatively quickly, Continental army (pg.200) commanders were unable to keep the militia units as part of their army for extended campaigns.³² When not in the immediate service of the Continental Army, militia units were effective (particularly in the South) in conducting rear guard actions against the British,³³ as well as preventing much in the way of a counterrevolutionary

²⁶ There is no question that militia units under the command of Daniel Morgan, most of whom were rugged frontiersmen and excellent shots, fought admirably. The British general Cornwallis' army was devastated after pursuing Morgan into the Carolinas. Even a skeptic like the American General Greene had to admire the ferocity with which they dispatched the British troops and their loyalist comrades. See HIGGINBOTHAM, *supra* note 18, at 366-76.

²⁷ *Id.* at 386 n.31 (quoting from the MARYLAND GAZETTE, Aug. 2, 1781).

²⁸ See HIGGINBOTHAM, *supra* note 18, at 439.

²⁹ Typical of such sentiments was the uproar over the so-called Society of Cincinnatus—an organization of all military officers who had served for three years or who were officers at the end of the war. *Id.* Condemnation was almost universal—Rhode Island even went so far as to take away the vote to any member of such an "anti-republican organization." *Id.* at 440.

³⁰ See *id.* at 441-42.

³¹ While the most famous of these uprisings was Daniel Shays' abortive raid on the federal arsenal in Springfield, Massachusetts, calls among the disaffected, particularly in the Northeast, for debt forgiveness and paper currency, resulted in flareups requiring the militia to be called up to arrest insurrectionists and keep order. See *id.* at 447-48.

³² It was this, as well as the attendant discipline problems with militiamen unaccustomed, and resistant to, taking orders from officers, that caused the greatest consternation among Washington, and his fellow generals. Republicanism's egalitarian gospel failed to produce any inborn respect for an "officer class." British officers recalled, indignantly, American prisoners—mere privates—who demanded to be treated as "gentlemen." See *id.* at 12.

³³ Commanders like the aforementioned Daniel Morgan and Francis Marion, the Swamp Fox, conducted campaigns that at least harassed, and at best inflicted serious damage to the British, whose strategic focus after 1777 switched to the South. See *id.* at 361.

movement from taking shape.³⁴ Finally, the mustering of the militia during various battles gave a wide cross-section of Americans a stake in the Revolution and its outcome.³⁵

C. The Framers and the Militia: Rhetoric and Reality

1. The Constitution and the Militia

A hard lesson learned during the Confederation period was that a government as decentralized as that under the Articles was not very effective.³⁶ Economically, politically, and militarily, the "United" States were isolated, not only from the rest of the world, but from each other as well. States were printing their own currency, imposing their own tariffs, and refusing to pay taxes to the Confederate Congress.³⁷ The Convention of (pg.201) 1787 was called to remedy these problems of the newborn country. One issue that split the convention, and which highlighted the coming debate over the entire Constitution, was the question of federal and state power over militia. The solution satisfied no one, and even the addition of the Second Amendment to the Constitution did little to quell the people's concerns.

Given the nationwide phobia of standing armies, conventional wisdom held that state militias would have to form the bulk of any national defense plan. The debate at the Philadelphia Convention centered around what power the national government would possess to raise armies, as well as the power it would have over state militias. On Saturday, August 18, George Mason of Virginia, a member of the Committee of Detail, proposed that the central government take more control over the organization and discipline of the state militias to ensure the efficacy of the militias for national defense.³⁸ In the alternative, Mason suggested the government control a portion of the militias for training every year—a "select" militia.³⁹

As the debate progressed, some delegates favored total governmental control of the militia, but only when in actual service of the central government.⁴⁰ Other delegates favored Mason's select militia plan, which would have placed various percentages of state militias under control of the

³⁴ Loyalists, or Tories, who remained loyal to the Crown mustered their own militia units to assist the British. Lacking popular support and looked down upon by the British regulars, these groups were not quite as effective as patriot irregulars. It is reported British commanders requesting reinforcements were told to use Loyalists—the British government evidently expecting vast numbers of loyal subjects to rise up. *See id.* at 11.

³⁵ It is worth noting that the complaints about the militia lodged by members of the nascent American military establishment concerned militia shortcomings *relative to* a European-style professional army. Such criticisms miss the point, if one is willing to accept as valid the thesis that a militia is different from a professional army, and in fact, if it is to fulfil its community purpose, should be different.

³⁶ *See, e.g.,* WOOD, *supra* note 4, at 393-429 (describing the widespread disillusionment and dissatisfaction following the Revolution).

³⁷ *See id.*

³⁸ *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 421 (Galliard Hunt & James Brown Scott eds., 1920) [hereinafter DEBATES].

³⁹ *Id.* Realizing states needed to retain some measure of control, Mason suggested states retain the right to choose their own officers. *Id.*

⁴⁰ Oliver Ellsworth suggested this, but noted, "[i]t must be vain to ask the States to give the Militia out of their hands." *Id.* at 425. On the other hand, Pierce Butler of South Carolina thought the government ought to have complete control over the militia. *See id.*

federal government during any one year.⁴¹ General Pinckney, seeing no reason for distrust of the national government, and having little faith in the militia, thought Mason's original motion ought to be renewed, emphasizing the need for a real fighting force.⁴² The (pg.202) day ended with Elbridge Gerry's warning that too much national control of the states' militias would result in "the plan [having] as black a mark as was set on Cain."⁴³

Debate resumed on Thursday, the 23rd,⁴⁴ and the chief issue was the wording of the Committee of Eleven's proposed clause. Rufus King opened, clarifying the point that "organizing" meant proportioning officers and men, and arming them with uniform caliber weapons; and that "discipline" meant prescribing the methods of drill and exercise.⁴⁵ When Elbridge Gerry complained this would reduce the states to drill sergeants, James Madison attempted a clarification: "arming," he argued, would mean neither the national government's *furnishing* arms, nor disciplining nor establishing courts martial.⁴⁶ Correcting Madison, however, King said there was no reason to suppose "arming" would not include the actual furnishing of arms "either by Militia themselves, the State Governments, or the National Treasury."⁴⁷

Delegates proposed alternative phrasing giving the Congress the power "[t]o establish a uniformity of arms, exercise and organization for the Militia and to provide for the Government of them when called into the service of the U. States."⁴⁸ Execution of the plan would be reserved to the states. As the debate drew to a close on this topic, the rhetorical lines were drawn between the positions of Elbridge Gerry and James Madison. Madison occupied the middle ground, arguing for *some* national control since the militia was intended to serve a national defense function.⁴⁹ Gerry, on the other hand, allowed no quarter where control of the militia was concerned—it must lie with the states.⁵⁰ (pg.203)

The debate concluded on a dramatic note, each staking out the position that, while ostensibly over the control of the militia, mirrored the larger debate over the ratification of the Constitution itself. Gerry thundered,

Let us at once destroy the State Gov[ernmen]ts, have an Executive for life or hereditary, and a proper Senate, and then there would be some consistency in giving full powers to the Gen[eral] Gov[ernmen]ts but as the States are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their

⁴¹ Delegate John Dickinson thought the power ought to extend to one-fourth of a state's militia. *Id.* Mason amended his motion to allow central control over only one-tenth of state troops. *Id.*

⁴² *See id.* at 426.

⁴³ *Id.* (alteration in original).

⁴⁴ On Tuesday, August 21, the Committee of Eleven reported back their formulation of the organizing power, which read: "To make laws for organizing arming and disciplining the militia, and for governing such part of them as may be employed in the service of the U.S. reserving to the States respectively, the appointment of officers, and the authority of training the Militia according to the discipline prescribed by the U. States." *Id.* at 435.

⁴⁵ *See id.* at 451.

⁴⁶ *See id.* at 452.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 453.

⁵⁰ "Will any man say that liberty will be as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State." *Id.*

existence.... Some people will support a plan of vigorous Government at every risk. Others of a more democratic cast will oppose it with equal determination, and a Civil war may be produced by the conflict.⁵¹

With equal vehemence, Madison answered back, asserting,

As the greatest danger is that of disunion of the States, it is necessary to guard ag[ain]st it by sufficient powers to the Common Gov[ernmen]t and as the greatest danger to liberty is from large standing armies, it is best to prevent them, by an effectual provision for a good Militia.⁵²

The final clauses adopted as part of the Constitution gave the Congress the power to raise armies (limiting to two years the time for which they may be provided for);⁵³ to call out the militia to execute laws, repel invasions, and suppress insurrections;⁵⁴ and to provide for the organization, arming and disciplining of the militia, as well as governing that portion of them actually called into service of the United States.⁵⁵ States retained the right to appoint officers.⁵⁶ Madison's argument won (pg.204) the day. If the country was to have any sort of national defense, and if standing armies were not an option, the Congress needed to have appreciable control over the state militias when the need arose.⁵⁷ For the Antifederalists, additional safeguards were needed to ensure that the federal government would not organize the militias out of existence, or leave a state defenseless because its militia was being sent to another state to execute laws, i.e. collect taxes or work some other manner of tyranny on its neighbor.

2. *The Federalist*, Antifederalist Concerns, and the Second Amendment

Commentators have noted differences between the rhetoric of the Revolution, and that which was used to defend the Constitution.⁵⁸ *The Federalist* observations about the militia illustrate the Framers' ambivalence about the level of national control that should be exercised over the state militias. Madison wrote enthusiastically of "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence."⁵⁹ Yet Hamilton, in an earlier paper, wrote that:

⁵¹ *Id.* at 454 (alteration in original).

⁵² *Id.* (alteration in original).

⁵³ *See* U.S. CONST. art. I, § 8, cl. 12.

⁵⁴ *See* U.S. CONST. art. I, § 8, cl. 15.

⁵⁵ *See* U.S. CONST. art. I, § 8, cl. 16.

⁵⁶ *See* U.S. CONST. art I, § 8, cl. 16. As will be seen, this power means very little under the current National Guard scheme.

⁵⁷ For the Federalist defense of national power over the militia, see THE FEDERALIST No. 28, at 204-07 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁵⁸ *See* Williams, *supra* note 2, at 570 ("By the early 1790's ... many of the nation's leaders had adopted a largely liberal ideology, and the decade as a whole was one of complex interaction between new ideas and old, both amply represented.").

⁵⁹ THE FEDERALIST No. 46, at 301 (James Madison) (Isaac Kramnick ed., 1987).

To oblige the great body of the yeomanry and of the other classes of the citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people and a serious public inconvenience and loss.⁶⁰ (pg.205)

Hamilton writes that requiring such service would also work an economic hardship on the country, "form[ing] an annual deduction from the productive labors of the country."⁶¹ Hamilton concluded by advocating a plan for a "select corps of moderate size ... ready to take the field whenever the defense of the State shall require it."⁶² In a few paragraphs, Hamilton repudiated a keystone of republican ideology, a universal militia, and by advocating the establishment of a select militia under federal control, played to the Antifederalists' worst fears about the Constitution.⁶³ Sadly, history has proven Hamilton correct. The vast majority of Americans do not wish to take the time to vote or serve jury duty, two other demonstrations of civic virtue; the prospect of assembling and drilling in county militias would be unthinkable to most.

Despite the voluminous amount of Antifederalist material that circulated in the states following the publication of the proposed constitution,⁶⁴ the objections voiced were essentially the same. Opponents were concerned that, under federal control, militias of one state would be forced to march into another state;⁶⁵ that militias would be called upon to execute the laws by force;⁶⁶ or that since the militias were under control of (pg.206) the federal government, the states would be effectively deprived of any means of resistance against the general government.⁶⁷

The inclusion of the Bill of Rights as an addendum to the Constitution was seen by Madison as a way to quiet many Antifederalist fears. Among them, in language copied largely from proposals for amendments drafted by the Virginia delegation, was the Second Amendment. It seems plausible that whatever possible Hamiltonian designs some Framers of the Constitution might have had on the state militias, the Second Amendment was placed there to ensure that Congress would not possess the wherewithal to disarm state militias by disarming the individual members of those militias.⁶⁸

⁶⁰ THE FEDERALIST No. 29, at 209-10 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁶¹ *Id.* at 210.

⁶² *Id.*

⁶³ Hamilton, it should be noted, did not advocate disarming those not in his "select corps." "Little more," he writes, "can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year." *Id.*

⁶⁴ See THE ANTIFEDERALISTS (Cecelia M. Kenyon ed., 1966) [hereinafter ANTIFEDERALISTS].

⁶⁵ See, e.g., *id.* at 22-23 ("Centinel" writes of the possibility a militia would be sent from Pennsylvania to Georgia or New Hampshire and be "made an unwilling instrument of oppression"). For Hamilton's rebuttal, see THE FEDERALIST No. 29, at 211. It is also interesting to note that at the same time fellow essayist James Madison is extolling the virtues of an armed populace against tyranny, Hamilton is unabashedly advocating a standing army, only reluctantly admitting that the political climate makes such an institution an impossibility.

⁶⁶ See ANTIFEDERALISTS, *supra* note 64, at 57 (statement of the "Pennsylvania minority").

⁶⁷ See, e.g., *id.* at 243 (statement of the "Virginia Convention").

⁶⁸

[T]he Second Amendment to the Constitution, apparently drafted to reassure men's minds against the fact that the federal government should maintain something in the nature of a professional army, affirms the relation between a popular militia and popular freedom in language directly descended from that of Machiavelli, which remains a potent ritual utterance in the United States to this day.

Thus, it seems that critics have it backwards when they seek to interpret the Second Amendment's "preamble" ("A well regulated militia being necessary for the security of a free state....") as a limitation on the right to bear arms. If the aim of those who demanded a Bill of Rights in the Constitution was to ensure the continuing viability of state militias in the face of federal control, what better way to ensure state militia strength than to place the ability to regulate individual rights to arms outside the realm of federal power? The preamble could therefore be seen as a rhetorical endorsement of the armed yeomanry, as opposed to the standing armies Congress was given the power to raise and provide for.⁶⁹ As Professor William Van Alstyne recently pointed out, the right guaranteed by the Second Amendment is "to keep and bear arms," not the right to join a militia.⁷⁰

Moreover, as Don Kates has persuasively argued, the underlying philosophy of both the republican ideology of the Framers that endorsed the militia as a civic institution, and the Second Amendment's guarantee of an individual's right to keep and bear arms is the same: the natural right of self-defense.⁷¹ Seventeenth century political philosophers thought that man entered into "social contracts" with one another, and established governments for self-protection, and from this "most self-evident of rights ... came the multiple chains of reasoning by which contemporary thinkers sought to resolve a multitude of diverse questions," even questions involving the establishment of principles of international law.⁷²

More to the point, John Locke justified the right of individuals to resist tyranny in government on the grounds that a tyrannical ruler and his minions were no better than robbers or other thieves who sought to do violence, not to individuals singly, but to the body politic as a whole.⁷³ "As inheritors of these ideas, the Founders believed that the right to arms was a necessary ingredient of the moral duty of self-defense."⁷⁴ Bearing arms enabled an individual citizen to defend himself and his (or her) home and family; a group of arms-bearing citizens functioning as a militia enabled the body politic to defend itself against tyranny.⁷⁵ Kates writes that "arms were deemed to

POCOCK, *supra* note 4, at 528.

⁶⁹ See, e.g., 1 THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 729 (8th ed. 1927) ("The alternative to a standing army is a 'well-regulated militia;' but this cannot exist unless the people are trained to bearing arms."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 746 (Da Capo Press 1970) (1833) (describing the militia as the "natural defense of a free country"). But see Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989) (arguing against an individual right interpretation of the Second Amendment).

⁷⁰ William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1236 (1994).

⁷¹ See Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87, 89 (1992) ("To natural law philosophers, self-defense was 'the primary law of nature,' the primary reason for man entering society.") (footnote omitted) (quoting William Blackstone).

⁷² *Id.* at 90.

⁷³ *Id.*

⁷⁴ *Id.* at 91.

⁷⁵ Kates contrasts this line of reasoning with that of modern Americans who tend to see

incidents in which a violent criminal is thwarted by a police officer as very different from similar situations in which the defender is a civilian. When the police defend citizens it is seen (and lauded) as defense of the community. In contrast, when civilians defend themselves and their families the tendency is to regard them as exercising what is, at best, a purely personal privilege serving only the particular interests of those defended, not those of the community at large.

Id. at 91. Such an attitude is certain present in some of the recent writings about the Second Amendment and militias. For a critique

protect (pg.208) against every species of criminal usurpation, including 'political crime,' a phrase which the Founders would have understood in its most literal sense."⁷⁶

Kates concludes:

In the absence of a police, the American legal tradition was for responsible, law abiding citizens to be armed and to see to their own defense, and for most military age males to chase down criminals in response to the hue and cry and to perform the more formal police duties associated with their membership in the *posse comitatus* and the militia.⁷⁷ It was the possession of arms in these contexts which the second amendment constitutionalized.⁷⁸

As we shall see, because of the link between the classical militia and the Second Amendment, some scholars have claimed that the demise of the former has rendered the latter meaningless.⁷⁹

Ironically, it was the states themselves which posed the greatest threat to the existence of militias. Feeling relieved of any responsibility to maintain viable forces after passage of the 1792 Militia Act, state militias atrophied due to neglect. Once the Federalists made the case for the need for central control of national defense forces, states basically felt free to ignore their militias, aside from appointing officers, assuming all the while that the Congress would take seriously its power to organize and prescribe discipline for the militias.(pg.209)

3. The Militia Act of 1792

The only real provision the first Congress made in its organizing role was the Militia Act of 1792⁸⁰ which provided for a universal United States militia, and specified a number of things each individual must have as a member of the militia. On paper, at least, the Congress provided for a universal national militia. For their part, the states could reasonably expect to appoint officers to

of one of those scholars, see notes 56-79, *supra* and accompanying text (criticizing David Williams).

⁷⁶ *Id.* at 93.

⁷⁷ For an argument that the tenets of the Communitarian movement would support a return to such literal "community policing," despite its platform's calls for "domestic disarmament," see Brannon P. Denning & Glenn Harlan Reynolds, *It Takes a Militia: A Communitarian Case for Compulsory Arms Bearing*, WM. & MARY BILL OF RTS. J. (forthcoming 1997).

⁷⁸ Kates, *supra* note 71, at 103.

⁷⁹ See notes 96-106, *supra*, and accompanying text.

⁸⁰ This Act provided,

That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accounted and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.

Militia Act of 1792, ch. 33, 1 Stat. 271. Such was the extent of Congress' provision for the militia until the twentieth century. For an account of the debate over the Militia Act, see David P. Currie, *The Constitution in Congress: The Second Congress*, 90 NW. L. REV. 606, 640-44 (1996).

command and train the state militia units "according to the discipline prescribed by Congress,"⁸¹ but neither happened. As the War of 1812 demonstrates, Congressional (and sometimes state) commitment to the militia rarely rose above the superficial and rhetorical.⁸²

D. The War of 1812

Despite its naval origins (the British insisted upon the right to stop American ships on the high seas and impress British citizens into naval service), the War of 1812 soon turned into a land war.⁸³ The first major theater of action was in the Niagara (pg.210) Falls and Great Lakes regions, but campaigns ranged from New York to New Orleans before the war's end. Given the large theater of action and the number of states affected, state militias saw a great deal of action.

An early problem that emerged with the state militias stemmed from a literal (and quite correct) reading of the Constitution on the part of militia commanders (and the soldiers themselves), as well as a traditional understanding of the militia's function. On several occasions, when ordered into Canada by federal army commanders, who often attempted to pull rank on state militia officers, the soldiers refused on the grounds that they could not, consistent with the Constitution, be ordered out of the United States.⁸⁴ In fact, during the early stages of the war, some state governors refused to submit their militia to federal control. Noting the absence of insurrection, rebellion, or invasion, they concluded the federal government was acting unconstitutionally when it attempted to muster the militia into federal service.⁸⁵

Those states responding to Congressional requests for units often sent their units ill-equipped and ill-trained, such that the scarce resources allocated for federal troops had to be further stretched to provide for scores of ragged state troops arriving at the front far from battle-ready.⁸⁶ One report from New Orleans described Kentucky troops arriving so ill-clad they had to (pg.211) hold their clothes together with their hands.⁸⁷ Conflicts inevitably arose between federal officers and state militia officials, who were often commissioned with more regard to political patronage than military

⁸¹ U.S. CONST. art. I, § 6, cl. 16.

⁸² I thank Professor Glenn H. Reynolds for the suggestion that the militia's "universality" may have ensured its neglect. If something like the militia cannot command a powerful interest group to lobby for legislative attention, it will rarely receive that attention. As will be seen, not only did state militias not have a powerful advocate, but, on the contrary, they had a powerful opponent: the professional military, who, at the turn of the century was able to lobby for the establishment of the present-day National Guard.

⁸³ See JOHN K. MAHON, *THE WAR OF 1812*, at 3 (1972) (describing the English ship *Leopard's* attack on the American *Chesapeake*).

⁸⁴ See *id.* at 45, 51. Interestingly enough, the federal officers seemed to acknowledge that what they were ordering they could not really constitutionally enforce. Thus, the early Canadian operations were hampered by the forced reliance on those militiamen who would volunteer to cross the border. See *id.* at 51, 80. This theory was later adopted by Attorney General Wickersham, when asked to render an opinion concerning the authority to order state militias into Mexico to pursue bandits. This was a factor in the decision to form the National Guard, and led to the decline of the state militias. See *infra* note 106 and accompanying text.

⁸⁵ See *id.* at 32 (describing the refusal of the Acting Governor of Connecticut to supply members of the militia on grounds that "the President had not indicated that there existed any of the three exigencies stipulated in the Constitution—an invasion, an insurrection, or a combination to break the laws ..."). For an example of a governor who felt constitutionally restrained against calling his state's militia for service in another state, see *id.* at 321 (recounting the dilemma of the governor of Vermont).

⁸⁶ See, e.g., MAHON, *supra* note 74, at 73.

⁸⁷ See *id.* at 363.

prowess.⁸⁸ States like Massachusetts, which was particularly proud of its militia (arguably the best in the country at the time), were scornful of the southern militias and of what they saw as a "Southerner's War."⁸⁹

However, American naval successes, as well as the strain on Britain's resources that resulted from fighting a two front war probably had more to do with the resultant peace treaty than did military power of the American ground forces.⁹⁰ It seemed clear that militia inefficacy was absolutely assured when states let their militia deteriorate, or sent them forth with inadequate supplies.

E. Conclusions

The end of the War of 1812 also brought to an end an important chapter in American national defense policy. After the second war with England, the federal government essentially gave up on state militias as a viable part of the nation's defenses.⁹¹ A professional army, they thought, was needed to protect American interests. The militias were seen as an inefficient use of men and material. Of course, such judgment begs the question: "Inefficient at which tasks?"^(pg.212)

While it was unlikely, given the omnipresent hostility to the militias on the part of professional soldiers like George Washington,⁹² that the militias would be fairly evaluated by the officer class, there is an argument to be made that during the American Revolution and the War of 1812, the militias performed well those tasks to which they were best suited. Militias were not professional armies and were seen as the antithesis of standing armies. Precisely because the goals of standing armies were seen as incompatible with a republican form of government, militias were not supposed to undertake the same role as a standing army.

What did the Framers think was an appropriate role for the militia? The Constitution mentions three situations in which the militia may be called into service of the United States government: "to execute the Laws, suppress Insurrections, and repel Invasions."⁹³ Examining those alone, the Framers apparently considered a limited, defensive role appropriate for militias. If those are the purposes for which militias were intended, they performed fairly well. State militias in Massachusetts, for example, "executed the laws," and "suppress[ed] insurrections" by putting down

⁸⁸ See *id.* at 316.

⁸⁹ See *id.* at 219 (noting that Massachusetts treated its militia officers who joined the United States Army as deserters.).

The United States almost dissolved nearly one half century before the Civil War as a result of the War of 1812. In late 1814, the New England states met in Hartford, Connecticut to discuss alleged abuses of the Madison government. A series of resolutions was passed, ranging from eliminating the use of the slave as three-fifths of a person for purposes of representation, to limiting presidential terms. The ultimate American victory, sealed by the Battle of New Orleans, kept the Hartford Convention from being anything than an ominous harbinger of regional troubles to come. For a full discussion of the convention, see MAHON *supra* note 74, at 375-77.

⁹⁰ See BRUCE D. PORTER, WAR AND THE RISE OF THE STATE 255 (1994) ("British fixation on Napoleon cut short [the War of 1812] giving the Americans an illusory victory").

⁹¹ See *id.* at 256 ("[By the middle of the 1800's] militias degenerated into social clubs of marginal military utility.").

⁹² Of course not all professional soldiers were hostile to the militia. See, *infra*, notes 148-181, and accompanying text (describing General Leonard Wood's role in the "Preparedness Movement" of the early twentieth century).

⁹³ U.S. CONST. art. I, § 8, cl. 15.

Shay's rebellions.⁹⁴ All the colonial militias "repel[led] invasions" with the Continental Army during both the American Revolution and the War of 1812, and did a better job than many in the professional military are willing to concede.⁹⁵ (pg.213)

However, not everyone believes the historical record supports the Framers' enthusiasm for citizen militias. In his book *Inventing the People*, historian Edmund Morgan presents a pessimistic view of the militia in a chapter entitled "The People in Arms: The Invincible Yeoman."⁹⁶ According to Morgan, the militia in England was part of the larger fiction of popular sovereignty, invented to displace the notion of divine right of kings.⁹⁷ Sixteen and seventeenth century theorists like James Harrington and Fortesque, who wrote effusively about the virtue of citizen militias, were devoured in America where, according to Morgan, "the ownership of land and of arms was much more widespread than in England...."⁹⁸

Morgan argues that the "cherished tenet of the yeomanry in arms, embodied in the militias, as the best and only safe form of military protection for a republic" was "at odds with fact."⁹⁹ He cites as examples, the willingness of George Washington to seek the formation of a professional army to engage the British during the Revolutionary War,¹⁰⁰ and Washington's subsequent complaint that the militia troops under his command were ill-disciplined and unsuited for combat against professional troops.¹⁰¹ In both England and America, Morgan believes that the myth of the invincible

⁹⁴ The militias and the state national guards were also employed in the last half of the Nineteenth Century to quell incidents of labor strife in the United States.

Unable to cope with widespread labor unrest through effective reform measures, American leaders at both the state and national level resorted to the last bastion of public order: military force. Between 1870 and 1900, the National Guard was mobilized some 150 times to cope with industrial disputes (though, significantly, not once did it serve under federal authority, as the Constitution allows). Only when the militia proved ineffectual did Federal troops intervene—in eight states during the Great Strike of 1877, in eleven states during the labor disturbances of 1894, and in the Coeur d'Alene mining region of Idaho on three occasions in the 1890s.

PORTER, *supra* note 81, at 268.

⁹⁵ See, e.g., Col. Charles Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionist Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995) ("Armed civilians organized into citizen militias did *not* determine the Revolution's military success as many believe."). Actually, as Don Higginbotham noted, the colonial militias did surprisingly well against the British. See HIGGINBOTHAM, *supra* note 18, at 57.

⁹⁶ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 153-73 (1988).

⁹⁷ See *id.* at 153. Writing that, to support the fiction of popular sovereignty, another fiction had to be created to support it.

This was the notion that the ability of the people to exercise sovereignty and control their government rested on the righteousness, independence, and the military might of the yeoman farmer, the man who owned his land, made his living from it, and stood ready to defend it and his country by force of arms.

Id.

⁹⁸ *Id.* at 159.

⁹⁹ *Id.* at 160.

¹⁰⁰ See *id.* at 161-62.

¹⁰¹ See *id.* at 163.

yeoman was no more than propaganda (pg.214) to secure the support of the propertied classes and to prevent them from "striking out on an independent unfamiliar political course of their own."¹⁰²

The best Morgan can say for the eighteenth century militia is that "besides suppressing revolts, [the militia] were also a means of forestalling them and of fostering consent to government, not by force but by instruction."¹⁰³ This subordination, writes Morgan, "was a willing social subordination, the kind of subordination that made orderly government possible."¹⁰⁴ He concludes: "The fiction of the invincible yeoman thus embodied the same ambiguities as the larger fiction that it supported [popular sovereignty]: it sustained the government of the many by the few, even while it elevated and glorified the many."¹⁰⁵

Morgan does make a final telling concession; one that often gets overlooked in discussions about military efficacy.

In teaching the yeoman his place in the social order, Morgan writes, "the militia performed an undesignated but crucial political function as well as a social function and performed both more successfully than its military function.... [T]he militia, however lacking in armed prowess, was a formidable means of lining up indifferent citizens on the side of the gentlemen who led the popular opposition to England and created popular governments."¹⁰⁶

Excessive focus on the win-loss column of the militias (which I argue was not that bad) risks losing sight of the fact that war is, in von Clausewitz's famous phrase, "politics by other means." Were it not for the high level of popular support given to the leaders of the Revolution by the citizenry, who can say for certain the Revolution would have turned out the way it did? Like voting, or serving on a jury, service in a militia—or even the possession of arms such that one *could* serve in such a capacity if called upon—gives citizens both a stake in the (pg.215) preservation of their society, and (perhaps more importantly) an active role in its preservation. In his haste to make his case that the militia was merely a shill for the ruling elite, Morgan does not stop to ponder other implications of militias' social and political significance and he is too quick to dismiss the militia's *actual* record in either the Revolution or the War of 1812.

Likewise, in his article, *Revolt of the Masses: Armed Civilians and the Insurrectionist Theory of the Second Amendment*, Colonel Charles Dunlap argues that the alleged efficacy of citizen-soldiers is a myth. This myth has been perpetuated, according to Dunlap, by proponents of the "insurrectionary theory of the Second Amendment."

Simply stated, the proposition holds that the possession of firearms by individuals serves as the ultimate check on the power of government. The concept postulates that the Second Amendment was intended to provide the means by which the people, as a last resort, could rise in armed revolt against tyrannical authorities. A critical corollary to the theory is the premise that masses of armed civilians could

¹⁰² *Id.* at 167.

¹⁰³ *Id.* at 169.

¹⁰⁴ *Id.* at 171.

¹⁰⁵ *Id.* at 173.

¹⁰⁶ *Id.* at 172.

subdue any professional standing army that might support a despotic regime, or itself seize power.¹⁰⁷

He argues that the real military efficacy of militias was a myth used, in part, to "legitimize the nation's traditional antimilitarism."¹⁰⁸ Citizen-soldiers neither are nor were a match for professional military forces, either in training, firepower, or discipline.¹⁰⁹ He argues that almost every time irregular units have directly engaged professional armies, the former have been defeated militarily.¹¹⁰ In addition, many times when the "irregular" forces win—Vietnam, Dien Bien Phu, Algeria, Afghanistan—the victorious forces are armed with heavy artillery, Stinger missiles, tanks, or are not irregular forces at all.¹¹¹_(pg.216)

Colonel Dunlap grounds his arguments on several assumptions that are at least debatable. First, he assumes that, as envisioned, there was no orderly plan for the training and drilling of militia members after the Revolutionary War. While admittedly both the states and Congress failed to follow through with the details of the Militia Act, not uncommon after a war, the Act was passed, provided for universal membership, and for mandatory muster and drilling at least once a month.¹¹² Second, when discussing armed revolt and the Second Amendment, Colonel Dunlap assumes that persons with military training, or any training, and gun owners are almost mutually exclusive. Dunlap does not consider the possibility that persons with some training would be able to train others. After all, the "force multiplier" theory of counterinsurgency is a keystone doctrine of organizations like the United States Special Forces.

Dunlap makes the case that throughout history, and especially in the twentieth century, armed civilians have never defeated a professional army in a face to face battle. However, militias are intended to be reactive and defensive when responding to threats. They muster and drill locally, know the area, and remain in place (since they presumably live in the place they are defending) so that even after battles are over, they can prevent rear guard action from taking place.¹¹³ One of the fatal flaws with the concept of civilians against a professional army, Dunlap argues, is that since the Second Amendment protects only arms you can bear, and only the type of arms you can bear that a militia would use, then civilians would never have access to the kinds of sophisticated hardware necessary to meet a modern, professional army on equal terms.¹¹⁴ Such a statement assumes that the militias (or even masses of individuals) would be so ill-trained they would not be able to mount an attack on say, a federal armory, to get such weapons—or that armed forces troops sympathetic to the uprising might not supply them with weapons.¹¹⁵ Dunlap also _(pg.217) seems to assume that a "political" defeat of a professional army is somehow inferior to a "military" defeat. It would seem

¹⁰⁷ Dunlap, *supra* note 95, at 644-45.

¹⁰⁸ *Id.* at 658-59.

¹⁰⁹ *See id.* at 659-60.

¹¹⁰ *See id.* at 659.

¹¹¹ *Id.* at 664-65.

¹¹² For the text of the act, see *supra* note 80.

¹¹³ Historian Don Higginbotham asserts that is exactly when the militias were most effective in the Revolutionary War. *See supra* note 33 and accompanying text.

¹¹⁴ Dunlap, *supra* note 95, at 662-64.

¹¹⁵ In the Revolutionary War, Ethan Allen commanded a militia which attacked a British garrison at Fort Ticonderoga, thus capturing heavy artillery needed to fortify colonial positions.

that a victory, even one produced by domestic agitation, like the United States' defeat in Vietnam, might be attributed by the *perceived* efficacy of militias. In such an instance, it makes little difference how effective the militia actually is.

Colonel Dunlap's assertions about the efficacy of armed civilians and militias work if one accepts his assumptions. As an active member of a "standing army" his biases should be obvious, but represent the historical antipathy the professional military has shown militias over time. This view represents part of the reason part-time, state militias will not make a comeback, but not all members of the professional military have held such a disparaging view of citizen-soldiers. During the twentieth century, at the same time the federal government was placing all military power in its own hands, there was a movement that attempted to recapture the spirit of the citizen soldier through universal military training and the use of summer training camps.¹¹⁶

II. THE DICK ACT AND THE PERMANENT FEDERALIZATION OF THE MILITIA

By the dawn of the twentieth century, federal defense policymakers, assisted by a group of retired professional military officers called the National Guard Association, began to agitate for reform of the state militia system. The architect of this reform was Secretary of Defense Elihu Root, whose first success with bringing order to an admittedly disordered militia system¹¹⁷ was the passage of The Dick Act in 1903.¹¹⁸

The Dick Act "signified the beginning of the demise of the old, essentially state-controlled, system."¹¹⁹ The Act required (pg.218) the states to submit to a number of federal requirements regarding the training, housing, and equipping of the state militias.¹²⁰ The Dick Act was the first in a series of moves by Congress, spurred on by the professional military and groups like the National Guard Association, that made the states offers they could not refuse: free training and equipment in

¹¹⁶ For a discussion of the "Preparedness Movement" and the MTCA see part III.A.

¹¹⁷ Underscoring the lack of attention paid by Congress since the enactment of the Militia Act of 1792, Theodore Roosevelt declared, in a message to Congress, "Our militia system is obsolete and worthless," *quoted in* *Perpich v. Dep't of Defense*, 496 U.S. 334, 341 (1990).

¹¹⁸ Dick Act, ch. 196, 32 Stat. 775 (1903) (repealed 1956).

¹¹⁹ Patrick Mullins, Note, *The Militia Clause, The National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 333 (1988) (detailing the history of the federalization of the militia system and the concomitant erosion of state control over an ostensibly state institution). Written before the Supreme Court's decision in *Perpich*, Mullin's Note describes the unhappy consequences resulting from Congressional evisceration of the militia clauses through increased federal mandates on the states that obligate them to trade constitutional prerogatives (like the appointment of officers) for federal funds needed to satisfy increased requirements.

¹²⁰

This Act also authorized federal funds for equipment and training and provided the states with training by federal regulars. Further, it required the states to drill their units a specified number of days a year, to open their account and property books to federal auditors, to subject training and encampments to federal inspection, and to obtain prior approval for the expenditure of federal grants-in-aid.

Id. at 333 (footnotes omitted). The legislation also provided that the President could call out the militia into national service for nine months, a power that was modified in a subsequent act. See JOHN G. CLIFFORD, *THE CITIZEN SOLDIERS: THE PLATTSBURG TRAINING CAMP MOVEMENT, 1913-1920*, at 9 (1972).

exchange for abdication of control. States, long neglectful of their militias, were all too happy to cede this control.¹²¹

The National Defense Act of 1908¹²² followed the Dick Act. This Act authorized the use of the newly constituted "National Guard" to serve outside the boundaries of the United States.¹²³ The inability to order the militia outside the boundaries of the United States arose from the traditional understanding of the role of militias as defensive forces, and was a major obstacle to American military operations against Canada during the War of 1812.¹²⁴ However, the 1908 act was too obvious a violation of the Constitution for either the Judge Advocate General (pg.219) of the United States Army or the United States Attorney General, both of whom deemed this portion of the Act unconstitutional.¹²⁵

Undeterred, Congress passed another National Defense Act in 1916 as part of general preparedness in the face of a widening European war.¹²⁶ Among the increased requirements placed on the states (and the Regular Army who had to administer these requirements) was an innovative solution to the constitutional prohibition against foreign use of militia troops: the President was authorized to draft state Guard members into national service as federal reserve troops.¹²⁷ As a result, the President began to draft whole regiments into the Reserves. Furthermore, the National Defense Act, as a condition precedent to the receipt of federal funds, forced the states to cede most of whatever control over the militia they retained, including the constitutional prerogative to appoint officers to command the militia.¹²⁸ As one commentator noted, "[a] recurring fact pattern emerges: the states, faced with ever more demanding standards but unable to pay for upgrading, are forced to accept both federal funding and the resulting loss of control that goes along with that funding."¹²⁹

In 1933, amendments to the National Defense Act implemented a "dual enlistment policy" whereby each member of a state National Guard unit simultaneously became a member of (pg.220) the United States National Guard.¹³⁰ When in the service of the United States, members became part of the Enlisted Reserve Corps of the Army, but retained their status as members of the state National Guard unless ordered into actual service of the United States.¹³¹ Troops could be ordered into actual

¹²¹ One wonders if the Supreme Court's decision in *Perpich* would have been different if not for the long history of neglect towards the militia exhibited by the states.

¹²² National Defense Act of 1908, ch. 204, 35 Stat. 399.

¹²³ *Id.* at 400.

¹²⁴ *See supra* note 84 and accompanying text.

¹²⁵ *See UNITED STATES WAR DEP'T, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: 1912-1940* 644 (1942); 29 Op. Att'y Gen. 322 (1912) (opining that the members of the National Guard could not be sent out of the country). *See also* Mullins, *supra* note 119, at 23.

¹²⁶ National Defense Act, ch. 134, 39 Stat. 166 (1916) (current version in scattered sections of 10 U.S.C. and 32 U.S.C.). For an account of the machinations behind the adoption of The National Defense Act see CLIFFORD, *supra* note 100, at 116-51.

¹²⁷ *See* Mullins, *supra* note 119, at 334. For its part, the Supreme Court upheld this constitutional end-run in the Selective Draft Law Cases, 245 U.S. 366 (1918) (holding the power to draft members of the National Guard into the Regular Army, as well as the power to compel civilians to render military service was granted to the President by the Constitution).

¹²⁸ Mullins, *supra* note 119, at 334. The right of the states to appoint their own officers was an important concession to antifederalists during the debates. It was thought state militia units would be less susceptible to corruption under federal control if units remained under the command of "sons of the state." *Id.*

¹²⁹ *Id.* at 334 n.66.

¹³⁰ 48 Stat. at 160.

¹³¹ *Id.* at 161.

service whenever Congress declared a national emergency and, during that service, were relieved of their status as members of the state National Guard.¹³² In 1952 Congress removed the national emergency requirement, authorizing instead "active duty or active duty for training" regardless of the presence of any sort of national emergency.¹³³ This power was subject to gubernatorial approval, which was removed by an amendment enacted in the mid-80s precipitated by the refusal of some governors to send forces to train in Central America.¹³⁴ The constitutionality of the so-called "Montgomery Amendment" was challenged by Minnesota governor Rudy Perpich and Massachusetts governor Michael Dukakis in 1988.¹³⁵

In *Perpich v. Department of Defense*,¹³⁶ the Supreme Court continued its acquiescence to federal usurpation of state constitutional prerogatives begun in *The Selective Draft Cases*.¹³⁷ Summarizing the history of the federal-state relationship between the state militias and the National Guard,¹³⁸ the Court (pg.221) rejected the governors' arguments that the Montgomery Amendment was unconstitutional.¹³⁹ Noting the governors did not challenge the ability of Congress to create a dual enlistment program,¹⁴⁰ the Court stated that the existence of such a program means that "members of the National Guard of Minnesota who are ordered into federal service with the National Guard of the United States lose their status as members of the State militia during their period of active duty."¹⁴¹ As a result, the governors could not complain, since the troops, once called into federal service, ceased to be under the state control.

Relying on its decision in *The Selective Draft Cases*¹⁴² and the portion of the Constitution granting Congress the power to "organiz[e], arm[], and disciplin[e] the Militia,"¹⁴³ the Court reaffirmed the "supremacy of federal power in the area of military affairs."¹⁴⁴ Holding the

¹³² *Id.*

¹³³ See *Perpich*, 496 U.S. at 346 (detailing the history of the federalization of the militia).

¹³⁴ The "Montgomery Amendment" as it was named, provided that "[t]he consent of a Governor ... may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty." *Id.* at 337.

¹³⁵ *Id.* at 334.

¹³⁶ 496 U.S. 334 (1990).

¹³⁷ 245 U.S. 366 (1918).

¹³⁸

The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization. The draft terminated the members' status as militiamen, and [the National Defense Act of 1916] did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army.

Perpich, 496 U.S. at 345.

¹³⁹ The governors' arguments were based on "the traditional understanding that 'the Militia' can only be called out for three limited purposes that do not encompass either foreign service or nonemergency conditions" *Id.* at 347.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 245 U.S. 366 (1918). This case was a constitutional challenge to the National Defense Act of 1916, which allowed the President to draft members of the National Guard directly into the service of the United States Army. The Court upheld the Act in sweeping language indicating that Congress was in no way limited by the militia clauses when exerting its express power to raise armies. *Id.* at 384.

¹⁴³ U.S. CONST. art. I, § 8, cl. 16.

¹⁴⁴ *Perpich v. Dep't of Defense*, 496 U.S. 334, 351 (1990).

Montgomery Amendment "not inconsistent with the Militia Clauses,"¹⁴⁵ the Court emphasized its decision was made without "pass[ing] upon the relative virtues of the various political choices that have frequently altered the relationship between the Federal Government and the States in the field of military affairs."¹⁴⁶ While the present Supreme Court may be more sympathetic to states seeking to vindicate their roles assigned under federalism against perceived encroachment by the federal government,¹⁴⁷ there is little likelihood the Supreme Court will abandon its extreme deference to the Federal Government in the areas of national defense and foreign policy. Furthermore, there is probably little (pg.222) sympathy at the state level for a reactivation of state militias, particularly in the face of widespread opposition by the professional military, whose members would characterize such a move as deleterious to national defense.¹⁴⁸

III. ATTEMPTS TO RECAPTURE THE MILITIA SPIRIT

Twentieth century attempts to reconstitute the militia as a real fighting force in this country invoke examples of the militias of Switzerland and Israel as support for the argument that a citizens' army is one of the highest achievements of a democracy. Militia proponents urge that universal military training, far from encouraging militarism, fosters a civic pride and an independence of spirit that renders such an army both morally, and, if universal, numerically superior to the traditional cadre-conscript army.¹⁴⁹ By instilling in its citizens training and discipline, a country with a real citizen's army would ensure the development of both a formidable fighting force and a virtuous, informed, and active citizenry, which would in turn secure the future of democracy in that country. The arguments parallel those made by the eighteenth century republicans. There have been three different times in the twentieth century during which enthusiasm for the militia has been fairly widespread: during the period immediately before and after the First World War; during the Cold War; and the present day "neomilitia" movement which reflects a darker side to the militia movement.

A. Plattsburg and the Preparedness Movement

The Plattsburg Movement was an outgrowth of the "Preparedness Movement," which peaked during the period immediately before and after the First World War, roughly 1912-1920.¹⁵⁰ The movement arose during the same time the federal (pg.223) government was beginning to modernize the nation's military forces, a move that resulted in the abrogation of the state's constitutionally assigned militia powers.

¹⁴⁵ *Id.* at 354.

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.,* United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (striking down the Gun-Free School Zones Act on Commerce Clause grounds).

¹⁴⁸ *See, e.g.,* Dunlap, *supra* note 95 (expressing serious doubts about the efficacy of citizen-soldiers against modern highly-trained professional armies).

¹⁴⁹ FREDERICK M. STERN, THE CITIZEN ARMY: KEY TO DEFENSE IN THE ATOMIC AGE 314-15 (1957) (advocating the establishment of a true "citizen army" like the Swiss *militza*).

¹⁵⁰ *See* CLIFFORD, *supra* note 100. Clifford's book offers an excellent account of the movement and the men who provided the impetus for it.

At the head of this movement was General Leonard Wood, expert fencer, horseman, and *jai alai* expert, once described by Secretary of War Newton D. Baker as "the most prodigiously busy man you ever saw."¹⁵¹ Appointed Chief of Staff of the Army in 1910, General Wood set about to reorganize the army so that it could fight a major international war.¹⁵² Wood differed from his colleagues, however, in that he possessed a faith in the citizen soldier.¹⁵³ Clifford adds, Wood "had faith in the citizen soldier. He said he could make civilians into soldiers in six months—instead of the customary two or three years. And Wood meant to put such principles into practice. He meant to breathe life into a citizen reserve."¹⁵⁴

The vehicle for Wood's plan was a summer training camp. Believing "[m]ilitary training did not have to be something tedious, dull, and ineffectual,"¹⁵⁵ Wood envisioned a six-week training course that would acquaint youths with what the army was all about.¹⁵⁶ Activities included vigorous physical exercise, introduction to military strategy, and field exercises. As the fundamentals were mastered, more specialized military tasks like engineering, artillery, and signals duty were introduced.¹⁵⁷ At the end of each week the youths endured a grueling hike during which maneuvers were conducted in order to integrate all the previous week's lessons.¹⁵⁸ These volunteer camps¹⁵⁹ were an experimental version for Wood's larger plan: (pg.224) the establishment of military training centers all across the country to train college men for future military service.

Because the volunteers at Plattsburg paid their own way, most were affluent college men from the East. In fact, a significant portion of the whole Preparedness Movement was fueled by the elite establishment.¹⁶⁰ Frightened by the war in Europe, and by the indifference of many Americans, these advocates of American preparedness used their considerable influence to ensure that General Wood's experiment at Plattsburg would expand and continue.¹⁶¹ The result was the establishment of the Military Training Camps Association (MTCA) with the goal of raising and maintaining a 400,000 man Continental Army which would replace the National Guard as the nation's line of defense after the regular army forces.¹⁶² While the proponents of Plattsburg and the MTCA recalled the spirit of republicanism in the Continental Army, and while 400,000-500,000 men was a sizable number to serve, this plan was in no way "universal," nor did it aim to be. Another concern was

¹⁵¹ *Id.* at 2 (footnote omitted).

¹⁵² *Id.* at 5-7.

¹⁵³ "I have always believed in the Militia ... because I know that in it is a strong soldier element ... and for the further reason I am certain the soldier element is going to dominate eventually" *Id.* at 8 (citation omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 14.

¹⁵⁶ *See id.* at 15.

¹⁵⁷ *See id.* at 16-17.

¹⁵⁸ *Id.* at 17.

¹⁵⁹ Those who volunteered for the summer camps had to pay their own way. "Not counting transportation, the cost amounted to approximately \$27.50" *Id.* at 16.

¹⁶⁰ General Wood gained two influential supporters in Grenville Clark and Elihu Root, Jr. who, after canceling a scheduled golf match due to the news about the sinking of the *Luisitainia*, saw a notice in the paper about the summer camps at Plattsburg, N.Y. The result was a luncheon at the Harvard Club and the resolution that the junior establishment ought to form a group dedicated to forming a reserve military corp of New York lawyers and businessmen. *See id.* at 54-55.

¹⁶¹ *See id.* at 92-93.

¹⁶² *See id.* at 104.

constructing the machinery to train the officers required to lead all these men.¹⁶³ Furthermore, this Continental Army and the camps that would be established to train its members were designed to be under federal control. Prior to the National Defense Act of 1916, serious constitutional impediments existed to such an overt federalization of militia forces.¹⁶⁴

The First World War and the immediate postwar reaction dampened enthusiasm for both universal military training and the entire Preparedness Movement.¹⁶⁵ No support existed for (pg.225) the implementation of the proposed National Army, even though the many combat veterans returning from Europe would have been ideal for the MTCA to form a trained corps around which a real citizens' army could be constructed.¹⁶⁶ While universal training stalwarts attempted to keep the faith, the end of the war brought about the end of the MTCA's role of examining and recruiting officer candidates¹⁶⁷ and, shortly after the Armistice, the death of the movement's most prominent patron, Theodore Roosevelt.

The MTCA mounted one last serious effort to effectuate a major change in American military policy. A memorandum appeared in the January 1919 issue of the MTCA's magazine and policy organ, *National Service*, written by one of the original Plattsburgers, a lawyer and an establishment figure named Thompkins McIlvaine.¹⁶⁸ The McIlvaine memorandum "proposed to substitute a Swiss-type citizen soldiery for the existing Regular Army, National Guard, and National Army."¹⁶⁹ This would be accomplished by training young men for six months, then taking a requisite number of them to make up a first line of defense, supplemented by a selective draft should the necessary number not be obtained.¹⁷⁰ Future West Pointers, graduates of ROTC programs, experienced professionals, and those from the ranks would officer the men.¹⁷¹

The McIlvaine plan was submitted to the 66th Congress as "The National Service Act" without major changes in the substance.¹⁷² McIlvaine and the Plattsburgers were given center stage at Senate and House hearings.¹⁷³ Most, if not all, of the witnesses extolled the virtues of the McIlvaine plan, and (pg.226) called a large standing army (in the words of McIlvaine himself) "uneconomic, undemocratic, and un-American."¹⁷⁴

The resulting National Defense Act of 1920, actually just amendments to the 1916 National Defense Act, did little to further the cause of the MTCA. The 1920 National Defense Act streamlined the organization of the regular army, and added provisions for a "Citizens Reserve"

¹⁶³ See *id.* at 104-05 (Grenville Clark wrote to a colleague that "[t]alk of officering 400,000 men by militia officers and men from military schools is *bunk*." (footnote omitted).

¹⁶⁴ See *id.* at 119. For a discussion of the 1916 National Defense Act, see note 106 *supra*, and accompanying text.

¹⁶⁵ See CLIFFORD, *supra* note 120, at 262 ("A major casualty of the postwar reaction was the military program Wood and the Plattsburgers had been advocating since 1915.").

¹⁶⁶ "[A]rmy reorganization became caught up in the whirlpool of confusion and prejudice that seemed to characterize all public questions in 1919 and 1920. Antagonism from the National Guard, differences within the Regular Army, mistaken ideas about militarism, economic concerns, politics—all worked against [universal military training]." *Id.* at 263.

¹⁶⁷ *Id.*

¹⁶⁸ See *id.* at 264-65.

¹⁶⁹ *Id.* at 265.

¹⁷⁰ *Id.* at 266.

¹⁷¹ *Id.* The McIlvaine proposal would have returned the National Guard to its pre-1916 status as a state militia.

¹⁷² *Id.* at 274.

¹⁷³ *Id.* at 276-82.

¹⁷⁴ *Id.* at 277.

consisting of volunteer veterans and others training under federal auspices.¹⁷⁵ However, not only did the amendments *not* return the National Guard to state control, there were stronger provisions for "federal training and federal pay" of the Guard.¹⁷⁶ The McIlvaine Plan, in the end, went down to public apathy, Congressional inertia, and a coming Presidential election. While the MTCA remained active in one form or another, there would never again be another well-organized effort on behalf of universal military training taken up by those with as much political power.¹⁷⁷

Clifford, in his assessment of the Plattsburgers, noted that they "tried to link modern [military] requirements with America's historic tradition of a citizen army."¹⁷⁸ In addition, while acknowledging this was an elite-driven movement, Clifford wrote, "the men who attended training camps were expressing their willingness to fulfill a citizen's military duty."¹⁷⁹ (pg.227) He also wrote how the Plattsburgers often acted "in opposition to official War Department thinking. By agitating for a citizen army, they found themselves in conflict with the professionals."¹⁸⁰ Perhaps the best summary comes from General Wood himself: "Plattsburg ... was not made by the Army ... but by an intelligent public opinion held up by a very few men in the Army and many intelligent ones outside the Army who saw what could be done."¹⁸¹ It is interesting to note that present-day elites advocating national service of some kind are always quick to point out the service they support is always nonmilitary.¹⁸²

B. A Modern Militia Renaissance

1. Unintended Consequences and the Debate Over the Second Amendment

The renewed academic debate concerning the meaning of the Second Amendment has been responsible, in an entirely unintended way, for the recent proliferation of private militias

¹⁷⁵ *Id.* at 293.

¹⁷⁶ *Id.*

¹⁷⁷ The preparedness advocates *did* succeed in getting the Selective Training and Service Act of 1940 passed in September of 1940.

Given the success of "People's Armies" in countries like China, as well as the emphasis on national defense prompted by the onset of the Cold War, the idea of a "citizen's army" again surfaced. *See, e.g.*, JOCK HASWELL, *CITIZEN ARMIES* (1973); STERN, *supra* note 149. To these proponents, a "citizen army" was distinguishable from all other types of military arrangements. "The *citizen army*," wrote one, "comprises virtually the entire citizenry, organized in peacetime by *universal obligation*, and *trained on a part-time basis*." STERN, *supra* note 149, at 16. Stern contrasts this with the "cadre-conscript army" which is a standing army using civilian conscripts when necessary "to enlarge its volume." *Id.* at 17. There is an initial training period, followed up by periodic refresher courses. Its officer corps consists mostly of citizens, assisted by "a limited number of professional soldiers who fill certain ... posts requiring continuity and full-time attention" *Id.* at 16. Stern's ideas sound much like those of the Plattsburgers, though it is interesting to note he mentions neither the Plattsburg Movement nor the MTCA.

¹⁷⁸ CLIFFORD, *supra* note 120, at 300.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 301.

¹⁸¹ *Id.*

¹⁸² *See, e.g.*, WILLIAM F. BUCKLEY, JR., *GRATITUDE: REFLECTIONS ON WHAT WE OWE TO OUR COUNTRY* (1990) (advocating "voluntary" public service for all high school graduates); Amitai Etzioni, *The New Rugged Communitarianism; Maybe Americans Are Just Too Free*, WASH. POST, Jan. 20, 1991, at B1. *See also* Williams, *supra* note 1, at 610-12 (advocating national service as a way to fulfill the role left empty by the decline of the militia). For a critique of Communitarians for ignoring how much the underlying principles of their movement track those which underlie rationales for universal militias, see Denning & Reynolds, *supra* note 77.

("neomilitias") that have formed to protest gun control measures and perceived federal tyranny.¹⁸³ What is surprising, though, is the source of support the neomilitias use to claim the right to organize. The standard argument among those who deny that the Second Amendment guarantees an individual's private right to keep and bear arms is that the Second Amendment really protects only the right of states to have militias that are free from federal control. Unfortunately, the proponents of this "state's right" interpretation of the Second (pg.228) Amendment never followed it to its logical conclusion, while several thousand of their fellow citizens have. Many neomilitias, citing "unorganized militia" statutes¹⁸⁴ that are on the books in most states, have formed private militias that assemble, drill, and even patrol.¹⁸⁵ These neomilitias have attracted additional national attention in the wake of revelations that one of the suspects in the Oklahoma City bombing was connected with the Patriot Movement and the Michigan Militia.¹⁸⁶

Though the various militia groups are geographically diverse, their members tend to share the same fears: federal gun control, erosion of national sovereignty, emergence of a United Nations led "one world government," and the invasion of the United States by shadowy socialist forces.¹⁸⁷ The movement (pg.229) seems to have been further galvanized by both the Randy Weaver trial and the Branch Davidian standoff in Waco, Texas.¹⁸⁸ Many organize into militia "companies" or "units," drill on weekends with weapons, and speak fatalistically about a coming showdown with the federal

¹⁸³ A search of the CURNWS file on NEXIS using the search terms "militia w/10 second amend!" yielded over 400 stories, most of which were filed in the last two years.

¹⁸⁴ See, e.g., KY. CONST. § 219; IOWA CODE § 29A.65 (West 1996); (1993); N.M. CONST. art. XVIII, § 1; N.D. CONST. art. XI, § 16; OHIO CONST. art. IX, § 1; S.C. CONST. art. XIII, § 1; S.D. CONST. art. XV, § 1; UTAH CONST. art. XV, § 1; WYO. CONST. art. XVII, § 1; ALA. CODE §§ 31-2-2 to -5 (1994); ALASKA STAT. § 26.05.010 (1995); ARK. CODE ANN. § 12-61-101(b) (Michie 1995); CAL. MIL. & VET. CODE § 122 (West 1988); CONN. GEN. STAT. § 27-1 (1992); GA. CODE ANN. § 38-2-3(d) (1994); IDAHO CODE § 46-102 (1994); IND. CODE ANN. § 10-2-3-1 (Burns 1992); KAN. STAT. ANN. § 48-904(e) (1994); MISS. CODE ANN. § 33-5-1 (1994); MINN. STAT. § 190.06 (1993); N.M. STAT. ANN. § 20-2-2 (Michie 1989); N.Y. MIL. LAW § 2 (McKinney 1990); S.D. CODIFIED LAWS ANN. § 33-2-2 (1994); TENN. CODE ANN. § 58-1-104(d) (1989); WYO. STAT. § 19-2-102 (1994).

¹⁸⁵ See Christopher J. Farley, *Patriot Gains:irate, Gun-Toting, White Men Are Forming Militias. Are They Dangerous, or Just Citizens Defending Their Rights?*, TIME, Dec. 19, 1994, at 48.

¹⁸⁶ See Robert D. McFadden, *Links in Blast: Armed 'Militia' and a Key Date*, N.Y. TIMES, Apr. 22, 1995, at A1 (detailing alleged links of Timothy James McVeigh with the Patriot Movement and the Michigan Militia).

The militia movement has also attracted the attention of Klanwatch and the Anti-Defamation League (ADL), both of which are concerned with connections between the new militias and traditional white supremacist and other hate groups. See *Armed and Dangerous: Militias Take Aim at the Federal Government: ADL Report of Right Wing Militants* Nov. 16, 1994, available in LEXIS NEXIS Library, CURNWS file. In its report, the ADL suggests a uniform Anti-paramilitary Training Statute.

¹⁸⁷ See, e.g., Keith Stone, *'Patriot Movement' Fights Licenses, Taxes, Zip Codes—Government 'Tyranny'*, ST. LOUIS POST-DISPATCH, Dec. 27, 1994, at 5b ("[Patriot Movement members] mistrust federal government and believe it is invading their privacy and saddling them with unconstitutional laws, including those that impose income taxes."); John Branton, *Clark County Militia*, COLUMBIAN, Nov. 13, 1994, at A1 (quoting David A. Darby, head of the Clark County, Washington militia, as saying, "The federal government is slowly trying to take away our Second Amendment, the right to bear arms."); Allan Turner, *Militias Willing to Take Up Arms to 'Save' the Constitution*, HOUS. CHRON., Nov. 27, 1994, at A1 (quoting leader of the Victoria County Constitutional Militia purporting to know of a 1961 State Department memo "which details the steps to replacing the military of sovereign states with a United Nations peacekeeping force" and insisting U.N. forces were "all over the place").

¹⁸⁸ See, e.g., Tim Weiner, *F.B.I. Hunts 2d Bombing Suspect and Seeks Links to Far Right*, N.Y. TIMES, Apr. 23, 1995, at A1, A12 (describing Oklahoma City bombing suspect Tim McVeigh as having voiced "extreme anger" over the assault by federal law enforcement agents on the Branch Davidian compound); Sam Walker, *"Militias" Forming Across U.S. to Protest Gun Control Laws*, CHRISTIAN SCI. MON., Oct. 17, 1994, at 1 (describing militia groups' denunciation of the Waco assault and the raid on Randy Weaver's Idaho compound); Adam Parfrey & Jim Redden, *Patriot Games: Linda Thompson, A Gun-Toting Broad from Indianapolis, Wants to Know "Are You Ready for the Next American Revolution?"*, VILLAGE VOICE, Oct. 11, 1994, at 26.

government.¹⁸⁹ Some militia units, mostly those active in the Florida panhandle, have even formed under the aegis of local governments.¹⁹⁰ All of this activity has left those who opposed the individual rights interpretation of the Second Amendment in favor of a state's right interpretation scratching their heads—particularly when groups which form under state militia statutes assert the right to arm themselves with semi-automatic weapons outlawed under the "Brady Bill."¹⁹¹ These state's rights Second Amendment advocates like Dennis Henigan claim, though, that the only "militia" left is the National Guard; thus private citizens may not form private militias to circumvent federal gun laws.¹⁹² Gun control advocates, however, are less certain exactly (pg.230) what the Second Amendment does, if it protects neither the right of individuals to bear arms, nor the right of states to form militias other than the National Guard. By emphasizing the "well regulated militia" portion of the Second Amendment, those opposed to an individual right to bear arms have unintentionally provided indirect encouragement to those seeking an outlet for their frustration with and antipathy towards the Federal government.

Yet those participating in this new militia movement are not the successors to the heritage of the colonial militias, the Plattsburgers, and the MTCA, any more than is the federalized National Guard. Nor is Dennis Henigan completely wrong when he makes the point that "the Framers understood the militia to be an instrument of governmental authority."¹⁹³ Citizens of the United States are not supposed to resort to the cartridge box as long as the ballot box and the jury box are functioning,¹⁹⁴ but (pg.231) should civil authority break down, or become so oppressive as to cease

¹⁸⁹ "It is not the first time James Johnson has considered the question: Will it eventually even down to an armed conflict? Still, there was a long pause before he answered. 'Yeah—and it scares the heck out of me,' he finally said." Darrel Rowland, *Couple Expect Armed Showdown on Rights; 'Unorganized Militia' Busy Organizing*, COLUMBUS DISPATCH, Oct. 16, 1994, at 2D.

¹⁹⁰ See Larry Rohter, *County Creates Militia To Defend Gun Rights*, N.Y. TIMES, May 29, 1994, at A14 (describing a unanimous vote of the Santa Rosa County Commission establishing a militia, and making eligible for service every man, woman and child in the county).

¹⁹¹ *Id.* ("[Militia supporters] assert that the Second Amendment confers special privileges to members of the militia, exempting them from Federal gun laws like the Brady law."). Cf. Reynolds & Kates, *supra* note 2 (arguing that a "collectivist interpretation" of the Second Amendment would amount to a *pro tanto* repeal of federal gun laws).

¹⁹² Compare Rohter, *supra* note 190, at A14, (quoting Dennis Henigan as saying "[y]ou can't avoid gun control laws just by creating some parallel bogus local militia, no matter how many times you get together and march around with guns") with Henigan, *supra* note 2, at 115 (arguing that the Framers meant the militia to be a sole instrument of state authority).

Unlike other purely private militias in Michigan and Arizona, the Florida county militias pose additional problems for militia gun control opponents because they are formed under the auspices of a county government. While under most state statutes, only the governor can call out the "unorganized militia," county sheriffs have traditionally had the power to deputize private citizens and form a *posse comitatus*. While counties might conceivably be seen as acting *ultra vires*, the question remains: What if a governor decided to create a true state militia—besides the state National Guard?

¹⁹³ Henigan, *supra* note 2, at 115. He is, however, wrong when he exclaims that "[t]he Constitution cannot view the militia both as a means by which government can suppress insurrection and as an instrument for insurrection against the government." *Id.* The only reason those at the Constitutional Convention allowed even this much federal control over state militia was because the universality of membership and the retention of the state's power to appoint officers would provide a check against overreaching by the federal government. Should the government attempt to use the militia in a tyrannical manner, the militia with its state officers would presumably disobey and possibly revolt. It is for these reasons that the federalization of state militias was so potentially harmful.

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[M]ilitia groups haven't thought about how the framers defined tyrannical government.... Although many militia supporters can quote the framers at great length on the right to bear arms, few seem aware that the framers also put a lot of effort into distinguishing between legitimate revolutions—such as the American Revolution—and mere "rebellions" or "insurrections."

functioning, the right to reconstitute the government is always retained by the people as the repository of sovereignty under our system.¹⁹⁵

2. The "Militia Movement" and the "Paranoid Style" of American Politics

The neomilitias are difficult to place in any historical context with the history of the militia that began in colonial times, because the neomilitias are operating, for the most part, outside traditional military and governmental structures and are in fact hostile to both. While the Plattsburg movement and the MTCA were private organizations, they operated in close connection with civilian and military authorities. The whole goal of the Preparedness Movement was to incorporate a universal militia into the national defense structure—not to revolt against it.¹⁹⁶

The neomilitias *can* be placed in an historical context along side what one historian has called the "paranoid style of American politics."¹⁹⁷ Suspicion of established power and an affinity for conspiracy theories have been part of American culture since before the Revolution.¹⁹⁸ In his groundbreaking work, *The Creation of the American Republic*, historian Gordon Wood writes of the disillusionment and unrest caused by the tremendous social and economic changes the young country faced after defeating England:^(pg.232)

Increasingly the events of the 1780s seemed to point toward a "crisis of the most delicate nature taking place," leading to "some crisis, some revolution" that could not be predicted. Many ... found themselves uneasy, "more so than during the war." Then there had been a "fixed object," and although the means and timing were questionable few had had doubts of the ultimate victory. But with the coming of peace "the case is now altered." Men saw ahead of them "evils and calamities, but without being able to guess at the instrument, nature, or measure of them."¹⁹⁹

The parallels to the present post-Cold War world are irresistible. The early Americans' unseen "evils and calamities" seem to have transmogrified into the neomilitia leaders' fears of "black helicopters" and "One World Government."²⁰⁰ With the end of the Cold War, one large monolithic enemy—world

¹⁹⁵ "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government" THE FEDERALIST No. 28, at 206 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

¹⁹⁶ See *supra* Part III.A.

¹⁹⁷ See Richard Hofstadter, *The Paranoid Style in American Politics*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 3-40 (1965). See also MCDONALD, *supra* note 4, at 78-79 (1985) (detailing conspiracy theories in America before and after the Revolution); WOOD, *supra* note 4, at 488 (describing Antifederalist obsessions with possible aristocratic conspiracies).

¹⁹⁸ "[T]he conviction on the part of Revolutionary leaders that they were faced with a deliberate conspiracy to destroy the balance of the constitution and eliminate their freedoms had deep and widespread roots—roots elaborately embedded in Anglo-American political culture." BAILYN, *supra* note 4, at 144.

¹⁹⁹ WOOD, *supra* note 4, at 393-94 (footnote omitted).

²⁰⁰ Several conspiracy theories circulating at the time of the Cold War are identical to those circulated by the neomilitias. Quoting from a 1963 *New York Times* article in which the Senate minority whip detailed some of the "fright mail" he received every month, Hofstadter writes:

Some of the more memorable "plots" that come to mind include these: 35,000 Communist Chinese troops

communism—has been replaced with hundreds of little enemies. Far from ensuring our security, the collapse of the Soviet Union and the balkanization of Europe seems only to have highlighted our insecurity. This feeling is comparable to that of our colonial forebearers whose victory over England only heightened anxieties and highlight factions hidden from view by the common purpose present during the Revolution. In addition, the emergence (pg.233) of a global economy has led to an erosion of the American industrial base and to increased economic insecurity. The result, when mixed with Americans' tendency to look for conspiracies, and fanned by rumors and innuendo, produces an atmosphere conducive to outlets such as the neomilitias.²⁰¹

The neomilitias have increased their numbers by playing on post-Waco fears of the militarization of federal law enforcement and perceived threats by the government to private ownership of guns. While their leaders insist that their motivation is purely defensive and that they would never preemptively engage in revolutionary activities, doubts remain on the part of many civil rights activists who claim that the anti-gun control posturing obscures a darker agenda.²⁰² An Anti-Defamation League report issued in the fall of 1994 examined neomilitia activity state by state and questioned the motivations of such groups. The report concluded:

Although thwarting gun control is the chief aim of the militias, they seek to turn the clock back on federal involvement in a host of other issues as well, e.g., education, abortion, the environment.

Clearly, their deeper suspicions and terrors should be of concern: Is their militant cause merely the alleged gun-toting "right" of citizens?—or is it the "turning (pg.234) around" of the U.S. itself from what the militants see as the "treasonous"

bearing arms and wearing deceptively dyed powder-blue uniforms, are poised on the Mexican border, about to invade San Diego; ... a United States Army guerilla-warfare exercise in Georgia, called Water Moccasin III, is in actuality a United Nations operation preparatory to taking over our country.

Hofstadter, *supra* note 197, at 29 (quoting Senator Thomas Kuchel). Elsewhere, Hofstadter writes of three men who drove 2,500 miles from Baghdad, Arizona to testify against a bill that would further restrict the sale of firearms through the mails. Hofstadter writes that "one of the Arizonans opposed it with what might be considered representative paranoid arguments, insisting that it was a 'further attempt by a subversive power to make us part of one world socialistic government.'" *Id.* at 5.

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But the fact that movements employing the paranoid style are not constants but come in successive episodic waves suggests that the paranoid disposition is mobilized into action chiefly by social conflicts that involve ultimate schemes of values and that bring fundamental fears and hatreds, rather than negotiable interests, into political action. Catastrophe or the fear of catastrophe is most likely to elicit the syndrome of paranoid rhetoric.

Id. at 39.

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[A]nalyt Mike Reynolds of the Southern Poverty Law Center says some of the people emerging as militia leaders have ties with hate-mongering groups. "They are being very canny about it," says Reynolds. "They aren't going around lighting torches and burning crosses at these meetings. They are using code words. Instead of talking about the Zionist occupation, they talk about the New World Order. It's the same old stuff dressed up for the '90s."

Farley, *supra* note 185, at 49.

direction of the federal government's present policies? The question which no one can answer just yet is what, exactly, the "militias" intend to do with their guns.²⁰³

However, the militias across the country are as diverse as their members; there are African-American, Jewish, Latino, and female members of militias.²⁰⁴ Furthermore, some militias have turned away persons wishing to join their militia unit who were involved in more traditional hate group activities.²⁰⁵

3. The Militia Movement and the Law

There are two features of neomilitias that distinguish them from either the old state militias, or quasi-private groups like the Plattsburgers: lack of universality in their membership,²⁰⁶ and the lack of state authority.²⁰⁷ Despite the fact these neomilitias might not have any official role in the national defense structure, does that mean they are illegal? The answer is unclear, because not all states have statutes specifically designed to address paramilitary groups. Most states, and some cities, do have laws which prohibit armed, private groups from drilling or parading in public. Does the Second Amendment give (pg.235) militia members the right to form what some may call private armies? Here the answer is probably no. However, there are important constitutional rights that are at least arguably involved: free speech, association, and the right to keep and bear arms.²⁰⁸

In the Anti-Defamation League's national report on neomilitias, it urged states to pass anti-paramilitary training statutes in an effort to give state law enforcement agencies legal recourse against such groups. "Law enforcement agencies," the report concluded, "need the requisite resources to monitor these groups and to take appropriate measures, when necessary to protect the public."²⁰⁹ The report included a "Model Paramilitary Training Statute" and suggested that states

²⁰³ See *ADL Report, supra* note 186. Morris Dees, founder of Klanwatch and the Southern Poverty Law Center has been keeping tabs on the militias and reportedly sent a letter in 1994 to Attorney General Janet Reno asking that the Justice Department put some neomilitias under surveillance.

²⁰⁴ See Ambrose Evans-Pritchard, *Patriot Games Turn Deadly: Illegal U.S. 'Militias' Threaten Rule of Washington*, SUN. TEL., Dec. 4, 1994, at 30 (quoting a Texas militia leader, who is Jewish, as saying "There's nobody [like white supremacists] in our unit. We're trying to recruit blacks, Latinos, Jews, women, anybody who wants to join.").

²⁰⁵ Farley, *supra* note 185 at 49 (quoting a California militia member who claimed that "neo-Nazis and white supremacists were purged from his militia").

²⁰⁶ The main feature the Framers thought would guarantee that the militia could never be used tyrannically would be that its membership would be universal, thus its interests would be identical to the interests of the citizenry at large. That is why standing armies and "select militias" were regarded as anathema. See Williams, *supra* note 2, at 358 [errata: 614] ("[The militia] could not betray the common good because the common good was its good.").

²⁰⁷ Note that this is not completely true in the case of the Santa Rosa County, Florida militia, which was authorized by the county commission, though not by the state.

²⁰⁸ See U.S. CONST. amend. I (free speech, association), amend. II (right to keep and bear arms). See also Joelle E. Polesky, Note, *The Rise of Private Militias: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593 (1996).

²⁰⁹ *ADL Report, supra* note 186.

adopt such measures to prevent the spread of the neomilitias.²¹⁰ Several states have adopted such legislation, (pg.236) many of which contain exemptions for gun clubs, hunting clubs, and the like.²¹¹

It is conceivable that more states will pass these paramilitary training laws in the wake of the Oklahoma City incident, and that these statutes might be tested in court. While there are certainly constitutional implications in such statutes—mainly the rights to speech and assembly—the United States Supreme Court has ruled that the state and local governments may prohibit organizations other than the organized militia of the state, cadets at military academies, and members of the United States armed forces from parading or drilling with arms in towns or cities in the state.²¹² "Military organization," the *Presser* Court held,

²¹⁰ ADL Model Paramilitary Training Statute:

- A. (1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that same will be unlawfully employed for use in, or in furtherance of, a civil disorder; or
- (2) Whoever assembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, intending to employ unlawfully the same for use in, or in furtherance of, a civil disorder—Shall be fined not more than (blank) or imprisoned not more than (blank) years, or both.
- B. Nothing contained in this section shall make unlawful any act of any law enforcement officer which is performed in the lawful performance of his official duties.
- C. As used in this section:
- (1) The term "civil disorder" means any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.
- (2) The term "firearm" means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon.
- (3) The term "explosive or incendiary device" means (a) dynamite and all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device and (c) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.
- (4) The term "law enforcement officer" means any officer or employee of the United States, any state, any political subdivision of the state, or the District of Columbia, and such term shall specifically include, but shall not be limited to, members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included within the definition of National Guard as defined by such section 101(9), and members of the Armed Forces of the United States.

Id. at app.

²¹¹ See CAL. PENAL CODE § 11460 (West 1992) (exempts peace officers and members of the U.S. and state military forces); FLA. STAT. § 790.29 (1994) (exempts law enforcement, recreation, education or self-defense classes); LA. REV. STAT. § 14:117.1 (1993) (exempts law enforcement offices, members of the military, and any organization which seeks to instruct "for a lawful purpose."); N.Y. MIL. LAW § 240 (McKinney 1994); OR. REV. STAT. § 166.660 (1994) (exempting military, law enforcement, and a host of recreational, and instructional classes); 18 PA. CONS. STAT. ANN. § 5515 (1983) (exempting law enforcement, military, recreational, and safety classes or "other lawful activities"); R.I. GEN. LAWS § 11-55-2 (1994); VA. STAT. ANN. § 18.2-433.2 (1996).

²¹² *Presser v. Illinois*, 116 U.S. 252, 266-68 (1886).

and military drill and parade under arms are subjects especially under the control of the government of every (pg.237) country. They cannot be claimed as a right independent of law.

It cannot be successfully questioned that the state governments, unless restrained by their own Constitutions, have the power to regulate or prohibit associations and meetings of the people ... and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations [except as authorized by federal law].²¹³

Despite the absolute language in *Presser*, the Court decided this case prior to the incorporation of the First Amendment's protection of freedom of assembly. Given the Supreme Court's acquiescence in the federal evisceration of the state's constitutional role in maintaining, training, and officering the militias,²¹⁴ the Court is unlikely to significantly hamper state or federal attempts to control groups which advocate violence against the government. Note, however, that militia meetings often involve exchanges of ideas, printed material, and speeches; any attempt to control the content of such meetings would certainly present constitutional problems under present Supreme Court jurisprudence.²¹⁵ Furthermore, there is a constitutional prohibition placed on the states' ability to maintain troops in peacetime without the consent of Congress.²¹⁶

It seems that, despite obvious differences, there is at least a degree of commonality between groups like the Plattsburgers, and other universal military service advocates, and members of neomilitias. The demise of the state militia and the professionalization of both law enforcement and the national military has left the ordinary citizen without a role to play in either the defense of his or her home or country. The National (pg.238) Guard is not a militia, in the sense that the Framers would have understood it,²¹⁷ any more than it is state-controlled.²¹⁸ As a result, people have attempted to find other outlets for the moral, political and social impulses that militias channeled into the service of the community; or else have sought ways to make existing institutions that have replaced militias more universal, and thus more like the classical militias of the eighteenth century.

²¹³ *Id.* at 267.

²¹⁴ *See supra* note 137 and accompanying text (discussing the effect of *Perpich v. Dep't of Defense* and *The Draft Cases*).

²¹⁵ *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *But see* *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 208-09 (S.D. Tex. 1982) (holding that the "private army" of the Klan had no First Amendment right to conduct military operations in violation of a Texas state statute which prohibited private armies from forming or parading with guns).

²¹⁶ "No State shall, without the Consent of Congress ... keep troops ... in time of Peace...." U.S. CONST. art. I, § 10, cl. 3.

²¹⁷ *See, e.g., Akhil R. Amar, The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1166 (1991). Amar writes:

Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional part-time volunteers, like today's Guard, would have been called "a *select* corps" or "*select* militia"—and viewed in many quarters as little better than a standing army.

Id.

²¹⁸ "Today's national guard is a very different force from the colonial-era militia. With 178,000 full-time federal employees and almost all of its budget drawn from the federal government, the National Guard is, for all practical purposes, a federal force." Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 384-85 (1994).

Not surprisingly, many citizens seek to exercise what Don Kates called "the most self evident of rights"²¹⁹ —that of self-defense—through the private ownership of firearms, which the overwhelming majority of Americans believe is a right guaranteed to them by the U.S. Constitution.²²⁰ While neomilitias have certainly misunderstood or misconstrued the original nature of the militia, they are often only following the logic of the "collective right" interpreters of the Second Amendment to a reasonable conclusion. In addition to being spawned by the seemingly omnipresence of a real paranoid strain among Americans, neomilitias are an unintended consequence of eliminating the constitutional militia, with all its supposed parochial inefficiencies, and replacing it with what is, at best, a select militia controlled by the federal government, and employed primarily as reserves for its considerable standing army. Given that we live in a post-militia era, it is no wonder that individuals would look to the Second Amendment—itsself supposedly a backstop (pg.239) against federal encroachment on the state's power to maintain a militia to protect against federal tyranny.²²¹ The next section examines arguments of Professor David Williams, who argues that the Second Amendment in a post-militia age is literally meaningless.

IV. THE SECOND AMENDMENT IN A POST-MILITIA ERA

With the recent proliferation of the neomilitias, a question arises that was not asked in the haste to centralize and modernize the federal armed forces during the first part of this century: Why were militias established in the first place? Even though we understand the Framers' apprehensions about standing armies, a majority of Americans probably no longer share that fear, at least to the extent that fear thoroughly informed the Framers' world view. What is it then about the right to bear arms and the right to revolt that retains such a visceral appeal to people who might not know anything else about constitutional law? Part of the answer can be found in Robert Cottrol's assertion that: "[t]here is considerable evidence that the armed population and the militia were intended to serve more than a simple military function. They were seen as fulfilling important political and perhaps moral purposes as well."²²²

Many present day commentators seem unwilling to acknowledge the unique role that the militia filled, one that is not easily replaced by service that is less martial.²²³ Since militias were the creatures of civic republican thought, one must consider whether the present-day citizenry possesses the requisite amount of civic virtue necessary to sustain a republican militia. Civic virtue and a willingness to subordinate all private concerns (pg.240) to those of the community were conditions precedent to the establishment of a virtuous republic. In other words, the republic was merely its citizens writ large; lack of virtue among them would doom the republic before it began. Thus, given that the Second Amendment is so entwined with republican thought, if we no longer adhere to that

²¹⁹ See Kates, *supra* note 71 at 90.

²²⁰ See *The Fight to Bear Arms*, U.S. NEWS AND WORLD REPORT, May 22, 1995, at 29 (reporting that 75% of the people polled agreed with the following statement: "Do you agree that the Constitution guarantees you the right to own a gun?").

²²¹ See Henigan, *supra* note 2, at 119. "The purpose of the [Second] Amendment was to affirm the people's right to keep and bear arms *as a state militia*, against the possibility of the federal government's hostility, or apathy, toward the militia." *Id.*

Tellingly, Henigan does not suggest what remedies might be available should the federal government, as I argue that it has, shows "hostility," or "apathy" to state militias. For an argument that, in such cases, there is implicit in the Second Amendment, an individual right of self-help, see Denning & Reynolds, *supra* note 7.

²²² Robert J. Cottrol, *Introduction* to GUN CONTROL AND THE CONSTITUTION xxxvi (Robert J. Cottrol ed., 1993).

²²³ See *supra* note 181 (discussing proponents of national service).

ideology, is the Second Amendment meaningless? David Williams makes this argument in an article entitled, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*.²²⁴

The role of the republican militia, argues Williams, "impact[ed] ... all the components of a republic into itself. If the state could not have virtue without virtuous citizens, then the militia would supply a virtuous citizenry; and if the citizens could not have virtue without a virtuous state, then the militia would provide virtuous state supervision."²²⁵ Thus, the Second Amendment is inextricably intertwined with the institution of the militia, and that "tradition offers no guidance for judicial mediation between the competing contemporary legal claims that the Amendment only supports the modern national guard or that it also supports a private right to arms for individual self-defense."²²⁶ Since one of the militia's two features was "universality"²²⁷ and since "[g]un owners today do not comprise a universal militia,"²²⁸ Williams concludes that "under modern conditions, the literal wording of the Second Amendment is meaningless."²²⁹ "To make any sense, the Amendment," he continues, "presupposed an institution now gone."²³⁰

Lacking either a militia or any hope that a militia could be successfully revived in any meaningful way,²³¹ Williams suggests ways courts could give effect to the Second Amendment to further its republican purposes, and proposes some "militia-surrogates,"²³² that would allow citizens to further the aims of (pg.241) the classical republican militia. Williams suggests courts could interpret the Second Amendment like the Due Process Clause of the Fourteenth Amendment: as "part of our scheme of ordered liberty," regardless of its original meaning.²³³ But, Williams would rather courts update the amendment "in a more republican fashion."²³⁴ For example, he suggests that "other fibers of the constitutional fabric" might be stretched to cover the hole left by the "demise" of the universal militia to give people increased power over their government.²³⁵ Thus Williams would deploy the Second Amendment to uphold campaign finance reform and proportional representation,²³⁶ to undermine "protection against the redistribution of traditional property rights,"²³⁷ and to increase constitutional protections for "newer forms of property."²³⁸ In addition, "the disappearance of the

²²⁴ Williams, *supra* note 2.

²²⁵ *Id.* at 585-86 (emphasis added).

²²⁶ *Id.* at 586.

²²⁷ *Id.* at 579.

²²⁸ *Id.* at 590.

²²⁹ *Id.* at 586.

²³⁰ *Id.* at 596.

²³¹ "The statutory provision creating this 'universal militia' [10 U.S.C. § 311 (b)(2) (1989)] is nothing more than a dim memory of a distant hope." *Id.*

²³² *Id.* at 603.

²³³ *Id.* at 597 (footnote omitted).

²³⁴ *Id.* at 598.

²³⁵ *Id.*

²³⁶ *Id.* at 599.

²³⁷ *Id.* at 600. Williams acknowledges the Takings Clause of the Fifth Amendment would present problems, but suggests a solution might be reached by arriving at a "hybrid" Fifth Amendment." *Id.* at 615 n.265.

²³⁸ *Id.* at 600.

militia should create a heightened constitutional suspicion of the standing army and the police."²³⁹ To serve as militia-surrogates, Williams suggests three possibilities: reviving the universal militia,²⁴⁰ universal service,²⁴¹ and finally, "direct control by the people of their government."²⁴² Williams concludes that, ultimately, the "concept of the militia" as a "regulative ideal" provides "a guide to interpreting the Second Amendment."²⁴³ Far from securing a judicially enforceable right "of separate individuals," though, the amendment "[a]t most ... can influence the interpretation of the other provisions."²⁴⁴

Williams sets himself apart from critics of the Second Amendment by admitting the powerful moral component that attached to militia service. He correctly places the Second (pg.242) Amendment into a republican theoretical framework. However, his conclusions about the Second Amendment's modern meaninglessness are unconvincing. As the foregoing discussion has shown regarding the federalization of the military power of the United States, official force in this country is neither decentralized nor universal—two salient features of the republican militia. The leap from that premise to the conclusion that, as a result of the militia's decline, the Second Amendment is meaningless, is a leap not easily made. At one point, Williams notes:

[t]he vision of the [Second] Amendment is not of a nation in which all may own arms but of one in which all are *in fact* armed. If only a small portion go armed, the hope of the Amendment will have failed as surely as if the government had prohibited arms bearing altogether.²⁴⁵

Such a statement, if taken seriously, suggests that because not everyone votes, any right to vote is now meaningless, since the Framers intended all who were eligible to take part in elections. Furthermore, the Framers knew that not *everyone* would be armed, for people who had religious scruples were exempt from militia service.

The main obstacle to Williams' argument and proposed solutions is the text of the Second Amendment itself.²⁴⁶ The right to keep and bear arms is given to the people—not to the states or the militia. Williams believes the use of the term "the people" protects "the people *as a whole and only as a whole*," and not "some random collection of individuals."²⁴⁷ If that were an accepted canon of constitutional construction, it seems that the same analysis would be applied to the Fourth Amendment which makes reference to the right of the "people" to be secure in their persons, papers and effects, from unreasonable searches and seizures.²⁴⁸ As interpreted, though, the Fourth (pg.243) Amendment protects individuals. Furthermore, why should the phrase "well regulated Militia"

²³⁹ *Id.* at 601.

²⁴⁰ *Id.* at 607-10.

²⁴¹ *Id.* at 610-12.

²⁴² *Id.* at 612-14.

²⁴³ *Id.* at 614.

²⁴⁴ *Id.* at 615.

²⁴⁵ *Id.* at 592.

²⁴⁶ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II.

²⁴⁷ Williams, *supra* note 2, at 592.

²⁴⁸ U.S. CONST. amend. IV.

be read to restrict or limit the "right of the people to keep and bear arms" when, as Williams mentions, one of the features of the republican militia is its universality? Even Williams admits that it is "probable that [the Amendment] used 'Militia' in this broader sense."²⁴⁹

Williams' view of the Constitution holds that a particular provision of the Constitution imports all of the nontextual baggage that may or may not have informed the adoption of that provision. If such an interpretation were applied widely, many freedoms now implicit in provisions like the First Amendment, might be rolled back wholesale.²⁵⁰ While the Second Amendment is not completely clear, it quite explicitly mentions the "right of the people to keep and bear arms."²⁵¹ Thus, preserving the Second Amendment as a regulative ideal while ignoring the text itself seems to represent a peculiar mode of constitutional interpretation. Despite Williams' doubts, the absence of a decentralized, universal, republican militia leaves little in the way of a "hole" in the Constitution. The solution to the interpretive problem posed by the federalization of the militia, and the concomitant abrogation of its envisioned role in American life, while not satisfying to those who have adopted extreme positions on either side, comes as close as possible to giving life to the amendment and addressing the concerns that drove the Founders to adopt the Second Amendment in the first place.

My solution is quite straightforward: the Supreme Court should interpret the Second Amendment to protect an *individual's* right to keep and bear arms. This right, of course, would not be absolute. It would be subject to competing governmental interests, some of which would be important enough to trump an individual's right.²⁵² Similarly, state and federal governments could enact certain restrictions to further those (pg.244) interests, but such restrictions would be required to be narrowly tailored—similar to the First Amendment "time, place and manner" restrictions.²⁵³

This solution not only honestly reflects the importance the Framers placed on an armed citizenry, but it also fulfills the criteria of universality and decentralization by ensuring that almost every law-abiding adult of sound mind would have the ability to arm herself. Most regulations of firearms would remain in place, as would state prohibitions against paramilitary activity, since those are not aimed at an individual's right to bear arms. Since the right would have to be exercised within parameters outlined by state and federal laws, the exercise of Second Amendment rights would be dominated neither by the state (as is true under a collectivist interpretation of the Second Amendment) nor by wholly private entities (as urged by many in the neomilitia movement).²⁵⁴

CONCLUSION

²⁴⁹ Williams, *supra* note 2, at 589.

²⁵⁰ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing the First Amendment was intended to protect only "political speech").

²⁵¹ U.S. CONST. amend. II.

²⁵² For example, an individual's right to bear arms would not likely entitle her to carry a loaded gun onto an airplane.

²⁵³ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (outlining a four part test regarding governmental regulations which have an "incidental" restriction on speech).

²⁵⁴ "[W]hile the militia must not be dominated by the state, it also must not be wholly private." Williams, *supra* note 2, at 590. Such an approach neither answers all the questions nor is likely to quell the debate over gun control, the neomilitias, or civic responsibility, but those are matters of public policy, not constitutional interpretation. Nor is this approach the last word on possible interpretations of the Second Amendment. Should an individual rights approach be adopted, things like the meaning of the word "arms," what it means to "keep and bear arms," and the outer limits of governmental regulation of that right would have to be litigated. I propose no solutions to those questions; they must await future treatment.

In many ways the debate over the "militia tradition" in this country—including the Framers' conception of a "militia"—is framed by this larger debate over the meaning and interpretation of the Second Amendment. As I researched, however, I became aware of an American tendency towards gradual abdication of the responsibilities of citizenship. The demise of the militia is only one example. Low voter turnout and an inability to impanel representative juries both indicate a general willingness to delegate responsibilities to "professionals," or simply to shirk them, and then complain when the results are not to our liking. As the repositories of sovereignty under our system, we ^(pg.245) have an obligation to pay constant attention to constitutional and political matters. Otherwise, it will remain axiomatic that "the safeguards of liberty" will be left to "controversies involving not very nice people."²⁵⁵ It should not be.

²⁵⁵ United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).